

ARTICLE

WITHDRAWAL FROM AFGHANISTAN MARKS GUANTÁNAMO'S ENDPOINT

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ABSTRACT

The United States has held 779 men and boys in Guantánamo during the two decades since the 9/11 attacks, justified by loose reliance on international law rules addressing prisoners of war; thirty-seven remained as of May 2022. The Supreme Court upheld the practice in its 2004 Hamdi v. Rumsfeld decision, holding that the congressional Authorization for the Use of Military Force against al-Qaeda and the Taliban included implied authorization of the “fundamental incidents” of war, including preventive detention and military trials. But it also explicitly noted that this authority ends at the close of “active hostilities.” The war ended in August, 2021, yet detention continues to this day.

Post-conflict use of military commission trials falling short of international and U.S. constitutional criminal procedure standards is also highly problematic. The Court’s 2006 Hamdan v. Rumsfeld decision recognized that military commissions depend on federal war powers for their existence. So these trials, too, cannot legitimately continue post-conflict.

While the Biden administration continues to pursue winding down Guantánamo via detainee transfers with “security assurances,” the law of war mandates prompt post-hostilities repatriation. There is no “bad dude” exception based on general threat perceptions—only an actual criminal sentence or pending charges can justify delay. The detainees must now be charged in federal courts, extradited to another country for prosecution, or promptly repatriated.

After demonstrating why the legal authority for Guantánamo detention and military commissions has expired, this Article provides recommended dispositions for each of the detainees remaining at Guantánamo consistent

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with residual law of war mandates. It concludes by arguing that this outcome actually serves larger overall U.S. national interests; Guantánamo's fiscal, legal, moral, and political costs have long outweighed its benefits.

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INTRODUCTION

The events of September 11, 2001 (9/11) represented a profound shock to both the American public and world legal order. For the first time, a terrorist group—traditionally regarded as criminals—committed violence of sufficient magnitude to constitute an armed attack that could allow the United States to legally exercise the right of self-defense in response.¹

¹ See, e.g., Lord Robertson, Sec’y Gen., NATO, Statement of NATO’s Position on 9/11 Attack Against U.S. (Oct. 2, 2001), <http://www.nato.int/docu/speech/2001/s011002a.htm> [<https://perma.cc/7HSZ-HRFE>].

President George W. Bush quickly termed 9/11 an act of war, and Congress agreed.² The Authorization for the Use of Military Force (AUMF) let the president use “all necessary and appropriate force” against those who “planned, authorized, committed, or aided the [9/11] attacks . . . or harbored such organizations or persons”³ While the U.S. public focus has always been on al Qaeda, in reality the group controlled no territory where an armed conflict could be contested, and an immediate U.S. intervention into Afghanistan could have been problematic under international law. The Bush Administration thus pursued a more sophisticated legal approach, demanding that the Taliban hand over Osama bin Laden and deny refuge to al Qaeda, which it refused to do.⁴ Only then did the U.S. government announce that it was exercising its inherent right of self-defense against al Qaeda *and* the Taliban, which continued to allow its territory to serve as a base of operations to “target United States nationals and interests.”⁵

U.S. combat operations in Afghanistan began in early October 2001 and by December, the Taliban had lost control of the country.⁶ There would be no happy ending, however. U.S. forces had displaced but not defeated the Taliban.⁷ They tracked Osama bin Laden to a cave complex in eastern Afghanistan known as Tora Bora, but the resulting opportunity to dismantle al Qaeda leadership was squandered, allowing him to flee into Pakistan.⁸ For the next two decades, U.S. forces were enmeshed in their longest conflict against the Taliban.⁹ The sporadic drone strikes against scattered al Qaeda remnants, and the manned raid to kill bin Laden in the sovereign territory of

² *President Bush Addresses the Nation*, WASH. POST (Sept. 20, 2001), https://www.washingtonpost.com/wpsrv/nation/specials/attacked/transcripts/bushaddress_092001.html [<https://perma.cc/55ZU-SK2L>].

³ Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001) [hereinafter AUMF].

⁴ See Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT’L & COMPAR. L.Q. 401, 406–10 (2002).

⁵ Permanent Rep. of the United States of America to the U.N., Letter dated 7 October 2001 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001).

⁶ Council on Foreign Relations, *Timeline: The U.S. War in Afghanistan, 1999–2021*, <https://www.cfr.org/timeline/us-war-afghanistan> [<https://perma.cc/T42U-BNNB>] [hereinafter CFR].

⁷ See *id.*

⁸ See YANIV BARZILAI, 102 DAYS OF WAR: HOW OSAMA BIN LADEN, AL QAEDA & THE TALIBAN SURVIVED 2001 87–100 (2014).

⁹ See generally CARTER MALKASIAN, THE AMERICAN WAR IN AFGHANISTAN: A HISTORY (2021) (detailing the history of the conflict through 2020).

“neutral” Pakistan would legally have to be justified as individual acts of self-defense.¹⁰

Many wondered if this conflict would have a clear endpoint. But after President Donald Trump reached a “peace agreement” with the Taliban, and his successor, Joe Biden, concluded that the continued U.S. combat presence in the “graveyard of empires” was futile, events moved at breakneck speed.¹¹ Afghan government forces crumpled within days of Biden’s August 14, 2021 announcement of the U.S. withdrawal, handing the Taliban an easy victory.¹²

The AUMF did more than just allow the application of combat power. As the U.S. Supreme Court confirmed in its 2004 *Hamdi v. Rumsfeld* plurality opinion, it also implicitly approved U.S. government exercise of the “fundamental incident[s]” of war, including preventive detention.¹³ To that end, President George W. Bush cited AUMF authority in a November 2001 military order directing military detention and trials for non-citizen members of al Qaeda and those aiding or abetting terrorism.¹⁴ The events of August 2021 answered the question *when* the hostilities launched in 2001 would end for the United States. But *what* are the legal consequences of that end of the hostilities for the Guantánamo detention facility created to hold detainees from Afghanistan, the flailing military commissions, and the thirty-seven men still languishing there?¹⁵ Those questions are the subject of this Article.

¹⁰ This result is mandated by international legal principles the United States explicated in the aftermath of the 1837 *Caroline* incident. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 268–77 (5th ed. 2011).

¹¹ See *Timeline*, *supra* note 6; Joseph Biden, President, White House, Remarks by President Biden on Afg. (Aug. 16, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/16/remarks-by-president-biden-on-afghanistan/> [<https://perma.cc/6V6S-X7K4>].

¹² See, e.g., Amber Phillips, *Trump’s Deal with the Taliban, Explained*, WASH. POST (Aug. 26, 2021), <https://www.washingtonpost.com/politics/2021/08/20/trump-peace-deal-taliban/> [<https://perma.cc/M55J-HCPD>]; Milton Bearden, *Afghanistan, Graveyard of Empires*, FOREIGN AFFS., Nov./Dec. 2001 (article by former U.S. CIA station chief in Pakistan presciently explaining why a U.S. military intervention in Afghanistan would ultimately fail); Joe Biden, President, White House, Statement by President Joe Biden on Afg. (Aug. 14, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/14/statement-by-president-joe-biden-on-afghanistan/> [<https://perma.cc/8RS5-H5G6>] (explaining his rationale for military departure).

¹³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion).

¹⁴ *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,831, 57,833–34 (Nov. 13, 2001).

¹⁵ *The Guantánamo Docket*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html> [<https://perma.cc/4X55-HL8A>] (last visited Apr. 4, 2022).

Guantánamo received its first arrivals from Afghanistan in January 2002, and at least 779 men and boys have been held there.¹⁶ The detention facility has fueled global controversy since the public first saw photos of blindfolded and shackled orange jump-suit clad detainees kneeling in wire cages. The Pentagon purposely released the images, naively thinking they would “reassure the world that its evolving detention strategy was humane.”¹⁷ Things only went downhill from there as one public relations debacle followed another. Revelations of detainee mistreatment, hunger strikes, suicides, crassly manipulated detention reviews, and flawed military commission proceedings provided a steady stream of negative headlines ever since.¹⁸ It did not help that it was soon clear that the detainees were not the “worst of the worst” as the Administration proclaimed.¹⁹ Many were unfortunate foreigners that locals handed over for cash bounties.²⁰ The flak led Bush to say as early as May 2006 that he would like to see the camp shuttered; by the end of his presidency, 532 detainees had already been released.²¹

The 2008 presidential campaign saw Barack Obama pledge to close Guantánamo, but he failed to do so in the post-election window of opportunity before a hardened opposition manifested itself.²² His tenure did, however, see the release of 197 more prisoners.²³ Trump took the opposite

¹⁶ JESS BRAVIN, *THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY* 74–78 (2014); ACLU, *Guantánamo by the Numbers* (May 2018), <https://www.aclu.org/issues/national-security/detention/guantanamo-numbers> [<https://perma.cc/B7JM-YR7A>].

¹⁷ Carol Rosenberg, *Sailor's Photos Became Icons of Guantánamo*, MCLATCHY NEWSPAPERS (Jan. 13, 2008), <https://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/prisoner-testimonies/sailors-photos-became-icons-of-guantanamo> [<https://perma.cc/3CF7-HUMG>].

¹⁸ See, e.g., Ben Fox, *Guantánamo Bay Prison Remains an Unresolved Legacy of 9/11*, ASSOCIATED PRESS (Sept. 9, 2021), <https://www.pbs.org/newshour/politics/guantanamo-bay-prison-remains-an-unresolved-legacy-of-9-11> [<https://perma.cc/8YN4-N2QE>].

¹⁹ *Id.*

²⁰ Individuals were still being detained based on misinformation more than a decade after 9/11. See, e.g., Hum. Rts. First, *The Flawed Guantánamo Assessment Files* (Dec. 21, 2016), <https://www.humanrightsfirst.org/resource/flawed-guantanamo-assessment-files> [<https://perma.cc/4PP4-6UB6>].

²¹ Hum. Rts. First, *Guantánamo by the Numbers* (Oct. 10, 2018), <https://www.humanrightsfirst.org/resource/guantanamo-numbers> [<https://perma.cc/8LNX-BYVE>]; ACLU, *supra* note 16.

²² BRAVIN, *supra* note 16, at 361.

²³ Hum. Rts. First, *supra* note 21.

tack, committing to “load . . . up” Guantánamo with “some bad dudes.”²⁴ But he was no more successful at fulfilling his promise than his predecessor had been; his term saw one detainee released and none added.²⁵ Even Trump conceded that the reported \$13 million annual cost per detainee of Guantánamo detention was “crazy.”²⁶ Biden repeated Obama’s campaign promise, but the first six months of his term also saw only one release.²⁷

Although Guantánamo detention operations continued unabated into 2022, the underlying legal authority has already expired. One reason Guantánamo detention has been so controversial was the shoddy characterization of the conflict as an open-ended “war on terror” and failure to recognize legal constraints that either the AUMF’s text or the international law of war imposed. Commentators worried that it would lack any endpoint; some described it as “generational.”²⁸ But the law of war has finite limits on detention, despite the disappointing lack of public discussion of their application to Guantanamo. This Article argues that U.S. detention authority technically ended by 2005, when the conflict in Afghanistan lost its international character. Even if U.S. courts are unlikely to overrule the political branches based on such a “fine point” of international law, Trump’s agreement with the Taliban provided a second distinct endpoint that should have had domestic legal effect. In any event, the final U.S. withdrawal and Taliban victory mark the end of the conflict relied upon to justify Guantánamo detention, even if other violence continues in that country. The Supreme Court made it clear in *Hamdi* that U.S. detention authority only existed because:

²⁴ Rebecca Kheel, *Guantánamo Population Isn’t Growing, and Prison Shows No Signs of Closing*, HILL (Oct. 25, 2020), <https://thehill.com/policy/defense/522543-guantanamo-population-isnt-growing-and-prison-shows-no-signs-of-closing> [https://perma.cc/GW5N-NAYL].

²⁵ HUM. RTS. FIRST, *supra* note 21.

²⁶ *Former Guantánamo Officials Blast Waste and Mismanagement as Costs to Taxpayers Top \$6 Billion*, DEATH PENALTY INFO. CTR. (Sept. 23, 2019), <https://deathpenaltyinfo.org/news/former-guant%20C%20A1namo-officials-blast-waste-and-mismanagement-as-costs-to-taxpayers-top-6-billion#:~:text=As%20U.S.%20taxpayers%20pick%20up,waste%20%20mismanagement%20%20and%20ineffectiveness> [https://perma.cc/X85R-MXPW].

²⁷ Sacha Pfeiffer, *Biden Administration Transfers First Detainee out of Guantánamo*, NPR, (July 19, 2021), <https://www.npr.org/2021/07/19/1017883509/biden-administration-transfers-first-detainee-out-of-guantanamo> [https://perma.cc/6SJ9-T3DY].

²⁸ Amos N. Guiora & Laurie R. Blank, *Don’t Deny Detainees Their Day in Court*, L.A. TIMES (Jan. 4, 2011), <https://www.latimes.com/archives/la-xpm-2011-jan-04-la-oe-guiora-detention-20110104-story.html> [https://perma.cc/Z8FB-2SMM].

Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who “engaged in an armed conflict against the United States.” If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of “necessary and appropriate force,” and therefore are authorized by the AUMF.²⁹

The American withdrawal from Afghanistan means that those “active combat” operations are now definitively over. While the AUMF also authorized using force against al Qaeda, its remnants have long lacked the organizational structure, and its operations the requisite intensity, for it legally to constitute a party to an armed conflict.³⁰ Biden’s announcement that America’s longest war is over necessarily marks the end of the authority that the Court recognized in *Hamdi*, if it had not previously expired already. Yet Guantánamo remains open, as the Biden Administration has resumed the previous Obama Administration’s incremental approach of seeking individual detainee reclassification and transfers with “security conditions” attached. Only two more detainees left Guantánamo in the first eight months after hostilities ended; as of April 2022, thirty-seven remain.³¹

While Guantánamo detention gets most of the attention, the military commissions have sporadically proceeded in its shadow.³² They got off to an abortive start; the Supreme Court halted them in its 2006 *Hamdan v. Rumsfeld* decision, which found their procedures fatally deficient.³³ Congress made tangible improvements by providing a statutory foundation in the 2006 and subsequent 2009 Military Commissions Acts (MCA).³⁴ To date,

²⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (cleaned up).

³⁰ Rita Katz, *Future of Al Qaeda, ISIS & Jihadism*, WILSON CTR. (Aug. 27, 2021), <https://www.wilsoncenter.org/article/future-al-qaeda-isis-jihadism> [<https://perma.cc/ZE4C-BWAR>].

³¹ See Carol Rosenberg, *U.S. Sends Algerian Man Home from Guantánamo Bay After 5-Year Delay*, N.Y. TIMES (Apr. 2, 2022), <https://www.nytimes.com/2022/04/02/us/politics/sufyian-barhoumi-guantanamo-bay.html> [<https://perma.cc/BLD7-3ZF4>].

³² ACLU, *Military Commissions*, <https://www.aclu.org/issues/national-security/military-commissions> [<https://perma.cc/HV9S-FNM7>].

³³ 548 U.S. 557, 567 (2006).

³⁴ JONATHAN MAHLER, *THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER* 298 (2008).

however, the commissions have still only rendered eight judgments; six by plea deals.³⁵ The D.C. Circuit Court of Appeals overruled the most frequently used charge: providing material support to terrorism.³⁶ As of September 2021, just four more cases, involving ten defendants, had moved past the arraignment stage, but all are still at least a year away from trial, denying victims of the Cole bombing and 9/11 long-overdue justice.³⁷

This Article examines the legal consequences of the end of the Afghan conflict on Guantánamo detention and the military commissions in four parts. Part I provides background context by explicating the relevant international law. Although both Guantánamo and the military commissions were justified as exercises of law of war authority, no branch of the U.S. government has been willing to concede that the full texts of the 1949 Geneva Conventions govern this conflict. To that end, Part I provides an historical review to highlight the strong case that basic detention rules are longstanding and binding customary international law. Part II considers how those rules make Guantánamo detention authority a dead letter. It argues that under relevant law of war rules, authority likely ended by 2005; again, with the maturation of Trump's 2020 Taliban deal; and in any event the 2021 U.S. withdrawal and Taliban victory provided the coup de grâce. Part III then examines the legal impact of the conflict's end on the Guantánamo military commissions, arguing that higher peacetime standards under both international and U.S. constitutional law now makes their use impermissible. Finally, Part IV makes recommendations for the disposition of the remaining individuals held at Guantánamo.

One cannot help but note the irony that our failure in Afghanistan grants Bush, Obama, and Biden at least a partial victory; Guantánamo detention now must end. While the results of the conflict were bittersweet, the endpoint of Guantánamo detention is really in the national interest of the United States. The costs of keeping Guantánamo open and continued use of the flawed military commissions—whether viewed from a fiscal, legal, moral, or political perspective—have long outweighed any practical benefits.

³⁵ Steve Vladeck, *It's Time to Admit That the Military Commissions Have Failed*, LAWFARE (Apr. 16, 2019), <https://www.lawfareblog.com/its-time-admit-military-commissions-have-failed> [<https://perma.cc/XEZ3-QJ98>].

³⁶ David Glazier, *Destined for an Epic Fail: The Problematic Guantánamo Military Commissions*, 75 OHIO ST. L.J. 903, 905 (2014); Hum. Rts. Watch, *The Guantánamo Trials* (2022), <https://www.hrw.org/guantanamo-trials#> [<https://perma.cc/23VZ-CSM5>].

³⁷ Carol Rosenberg, *Proceedings in 9/11 Case Resume, and Then Are Delayed Again*, N.Y. TIMES (Sept. 7, 2021), <https://www.nytimes.com/2021/09/07/us/politics/911-guantanamo-case-delay.html> [<https://perma.cc/7TN9-C8R5>].

I. THE LAW OF WAR FOUNDATION FOR GUANTÁNAMO DETENTION AND TRIALS

The initial decision to treat 9/11 as an armed attack, rather than crime, was unprecedented but not unjustified, given the level of violence. Adopting the war paradigm made sense considering al Qaeda's remote Afghan location, number of fighters at its disposal, and close relationship with the Taliban. It also offered practical benefits by permitting the exercise of "fundamental incident[s]" of war, including preventative detention, interrogation outside criminal procedure constraints, and ability to prosecute some conduct as war crimes.³⁸ Unfortunately, subsequent U.S. conduct seemed to claim law of war authority while ignoring its constraints.

A. *Historical Development of the Law of War*

American military leaders starting with George Washington have advocated faithful compliance with the rules governing hostilities, but in his day they were professional customs rather than actual law.³⁹ The 1785 Treaty of Amity and Commerce between Prussia and the United States, which hedged its bets by addressing treatment of prisoners "if war should arise" between them, marked an initial legal step.⁴⁰ Key provisions anticipated Geneva Convention rules adopted 144 years later, including requirements that prisoners be held in camps "open & extensive enough for air & exercise, and lodged in barracks as roomy & good as are provided by the [detaining power's] own troops."⁴¹ Formal multilateral law of war codification only began in the mid-nineteenth century, however, and many key developments post-date World War II.⁴²

³⁸ See David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 960, 965–79 (2009). But contrary to post-9/11 U.S. practice, the law does *not* permit coercive interrogations. *Id.* at 1027–31.

³⁹ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 13 (2010).

⁴⁰ Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America, Prussia-U.S., arts. 23–24, Sept. 10, 1785, https://avalon.law.yale.edu/18th_century/prus1785.asp [<https://perma.cc/363Z-WA6S>].

⁴¹ Compare *id.* art. 24, with Geneva Convention of 27 July 1929 Relative to the Treatment of Prisoners of War arts. 9–12, 23, 36–37, July 27, 1929, 75 U.N.T.S. 135. The 1785 language still protected U.S. and German POWs during World War I. ROBERT C. DOYLE, *THE ENEMY IN OUR HANDS: AMERICA'S TREATMENT OF PRISONERS OF WAR FROM THE REVOLUTION TO THE WAR ON TERROR* 167 (2010).

⁴² Gary D. Solis, *Recent Books on International Law*, 107 AM. J. INT'L L. 279, 280 (2013) (reviewing JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012)). See, e.g., U.K. MINISTRY OF DEFENCE, *THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT*, ¶¶ 1.28–1.38.1 (2004).

1. Early Development: The Lieber Code and Geneva Convention

Professor Francis Lieber wrote the first practical explication of the “customs and usages of war,” commonly known as the “Lieber Code,” to guide the Union Army in 1863.⁴³ European states widely copied the Lieber Code, which made a seminal contribution to subsequent legal codification.⁴⁴ The code was particularly influential in the development of Prisoner of War (POW) law and delineated who was entitled to that status—including soldiers, civilians “attached to the army,” and those taking up arms against an approaching invader.⁴⁵ Lieber made clear that the legitimacy of the cause fought for had no bearing on POW entitlement, and that “any violence against prisoners in order to extort the desired information or to punish them for having given false information” was forbidden.⁴⁶ He also declared that POWs could be tried for pre-capture crimes “against the captor’s army or people.”⁴⁷

While Lieber’s opus was progressing in the United States, Henry Dunant and four other leading Swiss nationals privately formed what became the International Committee of the Red Cross (ICRC) and convinced the Swiss government to invite states to an 1864 diplomatic conference that produced the initial Geneva Convention.⁴⁸ This concise humanitarian treaty established wartime safeguards and medical facilities for the wounded and made the red cross a protective emblem.⁴⁹

2. The Hague Conventions of 1899 and 1907

Thirty-five years later, the 1899 Hague Peace Conference produced six agreements, the most important being detailed pragmatic rules for ground combat.⁵⁰ The Hague Land Warfare Regulations included formal criteria for

⁴³ SOLIS, *supra* note 42, at 279–80.

⁴⁴ SOLIS, *supra* note 39, at 39–41.

⁴⁵ DOYLE, *supra* note 41, at 111; General Orders No. 100: Instructions for the Government of Armies of the United States in the Field arts. 49–51, Apr. 24, 1863 [hereinafter Lieber Code], https://avalon.law.yale.edu/19th_century/lieber.asp#sec3 [<https://perma.cc/E7M3-B5XX>].

⁴⁶ Lieber Code, *supra* note 44, at arts. 67, 80.

⁴⁷ *Id.* art. 59.

⁴⁸ SOLIS, *supra* note 38, at 46–49. Dunant would later share the first Nobel Peace Prize for his key role in this process. *Id.* at 49.

⁴⁹ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 75 U.N.T.S. 31.

⁵⁰ See JAMES BROWN SCOTT, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 vii–ix, 25–26 (2d ed. 1915).

belligerents entitled to participate in hostilities and POW protections.⁵¹ A follow-on 1907 conference very modestly updated the land warfare rules.⁵² Until the mid-twentieth century, war was still a discretionary policy choice for states. The 1907 Conference thus adopted a treaty about how states would declare war, and the Land Warfare Regulations mandated POW release “as quickly as possible . . . [a]fter the conclusion of peace.”⁵³

The 1946 judgment of the Nuremberg International Military Tribunal held that the 1907 Hague Land Warfare Regulations had become customary law by 1939.⁵⁴ If States can thus draw on this authority, but are also constrained by its limits, it might still be the case that the more recent Geneva Conventions would not apply.

3. The Geneva Conventions of 1929 and 1949

A diplomatic conference convened in Switzerland in 1929 produced modestly updated rules protecting the sick and wounded,⁵⁵ but more significantly, adopted a new POW Convention expanding on Hague rules.⁵⁶ The Geneva Convention of 1929 similarly barred coercive interrogation, mandated prisoner housing be equivalent to the detaining forces’ troops, and provided for the repatriation or transfer to a neutral power of individuals whose health was impaired.⁵⁷ It relied on neutral “protecting Powers” to aid in its execution, as well as the ICRC.⁵⁸ Still focused on interstate conflicts, it only required that POWs be released with the “least possible delay after the conclusion of peace.”⁵⁹

⁵¹ Convention (IV) Respecting the Laws and Customs of War on Land arts. 1–2, 4–20, 23, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Land Warfare Regulations].

⁵² SCOTT, *supra* note 50, at vii–ix, 25–26. This work helpfully prints the 1899 and 1907 versions of the convention side-by-side, permitting ready identification of the changes, along with a list of the states that had ratified each version. *Id.* at 100–31.

⁵³ Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259; Hague Land Warfare Regulations, *supra* note 50, art. 20.

⁵⁴ ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 68 (3d. ed. 2000).

⁵⁵ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field arts. 18, 28–29, July 27, 1929, 47 Stat. 2074.

⁵⁶ See, e.g., ROBERTS & GUELFF, *supra* note 54, at 243.

⁵⁷ Geneva Convention Relative to the Treatment of Prisoners of War arts. 5, 10, 68–74, July 27, 1929, 47 Stat. 2021 [hereinafter 1929 POW Convention].

⁵⁸ *Id.* arts. 86–88.

⁵⁹ *Id.* art. 75.

States came together in Geneva again in the aftermath of World War II to expand further the scope of humanitarian protections in armed conflict; the four resulting agreements are now the world's most widely ratified treaties with 196 state parties.⁶⁰ The Third Convention addresses detention-related matters, including fair trial standards and prisoners of war, while the Fourth Convention addresses civilian protections, making those two provisions the most relevant to Guantánamo issues.⁶¹

One key 1949 innovation was an identically worded provision in each Convention, known as “Common Article 3,” providing the first agreed upon limits on non-international armed conflict: minimum standards of treatment for anyone not actively participating in hostilities.⁶² It applies to “conflict not of an international character occurring in the territory of one of the High Contracting Parties.”⁶³ Previously, law of war rules applied only to conflicts between states; governments reserved the right to deal with rebels and other non-state actors with whatever means their national laws allowed, absent a formal “recognition of belligerency.”⁶⁴ How a conflict is classified, though, makes no difference to victims. From a humanitarian perspective the international versus non-international distinction makes little sense, and so the 1949 Conventions were originally drafted to apply to all conflicts. But after many nations, including the United States, strongly objected, Common Article 3's modest limits were adopted as a compromise.⁶⁵

⁶⁰ Imogen Foulkes, *Geneva Conventions Laws of War “Need Fixing,”* BBC (Dec. 8, 2015), <https://www.bbc.com/news/world-europe-35023029> [<https://perma.cc/M9QW-P8EQ>]. In comparison, the UN has 193 members. See United Nations, *Growth in United Nations Membership*, <https://www.un.org/en/about-us/growth-in-un-membership> [<https://perma.cc/L5VQ-UXUB>].

⁶¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV] [hereinafter, collectively, 1949 Geneva Conventions].

⁶² LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 30 (2002).

⁶³ 1949 Geneva Conventions, *supra* note 61, art. 3.

⁶⁴ The international law of war could apply to non-international conflicts reaching a level of sufficient scale and intensity that either the contesting state, or third nations desiring to maintain a position of neutrality towards both the non-state adversary and the contesting state, recognized the insurgents as “belligerents.” See, e.g., MOIR, *supra* note 61, at 4–18.

⁶⁵ ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 27–49 (2010).

The 1949 Conventions broke ground by identifying specific abuses of persons whom the treaties protected during an international armed conflict (e.g., “wilful killing, torture or inhuman treatment”) as “grave breaches.”⁶⁶ States must either prosecute or extradite perpetrators regardless of nationality, effectively creating universal jurisdiction.⁶⁷

The proliferation of non-international conflicts and guerilla warfare during the next few decades, coupled with the codification of international human rights law, raised questions about how existing rules applied.⁶⁸ States therefore reconvened in Geneva in 1977 and concluded two supplemental agreements. Additional Protocol I updates international armed conflict rules in all four 1949 conventions.⁶⁹ The much shorter Additional Protocol II just expands Common Article 3 protections applicable to non-international conflicts and establishes threshold conditions for distinguishing between riots and isolated violence and actual armed conflict.⁷⁰

The two Protocols are widely ratified: Additional Protocol I has 174 parties, including most key U.S. allies, China, and Russia; Additional Protocol II has 169, and there are very strong reasons to believe that many key provisions of both Protocols now constitute customary international law. But the United States has not ratified either protocol or comprehensively stated which rules it considers binding law.⁷¹

⁶⁶ See, e.g., Geneva I, *supra* note 60, art. 50 (identifying grave breaches of that agreement).

⁶⁷ INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION, §§ 2824, 2846 (2016). One may plausibly argue that these acts were not truly war crimes at the time, since the Convention drafters elected not to use the term and the treaties’ facial language fairly reads as calling for states to prosecute under national, rather than international law. Paola Gaeta, *War Crimes and Other International “Core” Crimes*, in THE OXFORD HANDBOOK OF INT’L LAW IN ARMED CONFLICT 737, 739 (2014). But that point is now moot given that Additional Geneva Protocol I of 1977 explicitly declares breaches of both that Protocol and the 1949 Conventions to be “war crimes.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art 85, ¶ 5, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

⁶⁸ ROBERTS & GUELFF, *supra* note 54, at 419–20.

⁶⁹ *Id.* at 420–21; Additional Protocol I, *supra* note 67.

⁷⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609–99 [hereinafter Additional Protocol II]; ROBERTS & GUELFF, *supra* note 54, at 481–82; MOIR, *supra* note 62, at 160, 166–67.

⁷¹ David Glazier et al., *Failing Our Troops: A Critical Assessment of the Department of Defense Law of War Manual*, 42 YALE J. INT’L L. 215, 271–74 (2017).

B. International Versus Non-International Armed Conflict

The legal distinctions between international and non-international conflict go well beyond the differing scope of applicable legal rules. There are also fundamental differences in the way that their existence is determined.

Historically, “war” was a legal state of affairs between nations, initiated with a formal declaration and concluded with a peace agreement.⁷² A state of war could exist for extended periods between those mileposts without any actual violence taking place. The UN Charter’s proscription of the discretionary resort to force has made declarations of war obsolete, but any armed confrontations between states more substantial than minor frontier incidents constitute an international armed conflict to which the law of war applies. Combat is not required—for example, the occupation of a foreign territory not met with armed resistance still qualifies.⁷³ Nor does it require mutual agreement; the Geneva Conventions apply “even if the state of war is not recognized by one of them.”⁷⁴ A low threshold makes sense given the robust humanitarian protections the law of war provides, and the reluctance of many states (including the United States) to acknowledge that human rights obligations apply extra-territorially.⁷⁵ The alternative would be to leave many persons outside of any protective legal regime when states used force outside their borders.

Criteria for invoking application of the international law governing non-international conflict are more stringent. When regulation was first considered in 1949, states wanted a high threshold to preserve maximum flexibility in dealing with internal disorder under national law.⁷⁶ Today, however, the intervening development of more restrictive human rights law limits the prior discretion that states possessed to deal with internal violence with a free hand. So the ironic impact of a higher standard for invocation is that it now raises the bar that states must clear to use lethal military force domestically.

Violence involving non-state parties only rises to the level of an armed conflict if it is of sustained intensity and the non-state group has a

⁷² See DINSTEIN, *supra* note 10, at 9.

⁷³ UK MINISTRY OF DEFENCE, *supra* note 42, ¶¶ 3.2–3.2.3.

⁷⁴ 1949 Geneva Conventions, *supra* note 61, art. 2.

⁷⁵ See GEN. COUNS. OF THE DEPT. OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 1.6.3.3 (2016) [hereinafter DOD LAW OF WAR MANUAL].

⁷⁶ See, e.g., EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 7 (2008).

significant degree of organization.⁷⁷ Although international courts do not “make” law, their decisions are “subsidiary means for the determination of rules of law;”⁷⁸ the International Criminal Tribunal for the Former Yugoslavia’s holdings in its initial Tadic case are frequently cited for this proposition.⁷⁹ In any case, what is legally dispositive is states’ explicit acceptance of this principle, as they frequently refer to Tadic and subsequent decisions.⁸⁰

Nathalie Weizmann, a former ICRC and current United Nations legal officer, has helpfully summarized the common understanding of the level of violence required to constitute a non-international conflict:

Determining the intensity of the violence requires an assessment of the facts on the ground. Intensity of fighting can be determined by several indicators, including the number, duration, and intensity of armed confrontations, whether the fighting is widespread, the types of weapons and equipment used, the number and caliber of munitions fired, the number of fighters and type of forces participating in the fighting, the number of military and civilian casualties, the extent of material destruction, and the number of civilians fleeing combat zones.⁸¹

Neither sporadic terrorist attacks nor “targeted killings” by government forces satisfy the requisite intensity threshold necessary for the continued existence of an armed conflict.

There is also general agreement that a “non-state” party must have a “sufficient” degree of “organization,” but there is less clarity about what that requires. Factors that courts have applied include the (1) existence of a multi-

⁷⁷ See, e.g., YORAM DINSTEIN, *NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW* 20–36 (2014).

⁷⁸ Statute of the International Court of Justice art. 38, ¶ 1.d., June 26, 1945, 59 Stat. 1055.

⁷⁹ This is true of both academic commentary, see, e.g., CULLEN, *supra* note 65, at 122, and actual state publications, see, e.g., UK MINISTRY OF DEFENCE, *supra* note 42, § 15.3.1.

⁸⁰ See, e.g., UK MINISTRY OF DEFENCE, *supra* note 42, § 15.3.1. (quoting Tadic), and DEP’T OF THE ARMY & U.S. MARINE CORPS, *THE COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE*, FM 6-27/MCTP 11-10C (Aug. 2019) (stating intensity and organization requirements).

⁸¹ Nathalie Weizmann, *The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF*, 47 COLUM. HUM. RTS. L. REV. 204, 211 (2016).

level command structure; (2) ability to conduct organized operations; (3) logistical capabilities including supply and recruiting functions; (4) internal discipline and training and ability to comply with Common Article 3; and (5) ability to speak with one voice and engage in political negotiations.⁸² It is debated whether these criteria are “indicative” factors to be weighed generally, or a “determinative” checklist that must be met.⁸³ But there is little dispute that the minimum requirement is a functional hierarchical structure letting it “exert authority over its members.”⁸⁴

C. Detention Duration in International Armed Conflict

States engaged in an international conflict can conduct preventive detention under two regimes: (1) that of POWs and (2) under less well-known rules for civilians posing a serious threat to the detaining power. Details are now expounded in the Third and Fourth Geneva Conventions, respectively.⁸⁵ The core rules are now customary law, applicable to any person or situation in an international conflict, even if some of the fine details might not be.⁸⁶ This detention is non-punitive, justified only for security reasons, while the rules balance state protection against limiting detainee hardship.

Law of war detention is “indefinite” in that it cannot be known *ex ante* how long active hostilities will last. Unfortunately, that term can also connote a lack of limits. But the law imposes meaningful constraints on who can be held, when they must be released, and what process is required.

1. Detention of Prisoners of War

POW status is primarily granted to persons whom the law of war recognizes as “combatants.”⁸⁷ They receive “belligerent immunity” from domestic laws for their conduct during hostilities, but at a price. The combatant may be killed on sight unless *hors de combat* (out of action due to sickness, wounds, or having been captured) and detained for the duration of

⁸² See Jann K. Kleffner, *The Legal Fog of an Illusion: Three Reflections on “Organization” and “Intensity” as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict*, 95 INT’L L. STUD. 161, 164–67 (2019).

⁸³ *Id.* at 168–69.

⁸⁴ See *id.* (quoting International Criminal Tribunal for the Former Yugoslavia (ICTY) decision in *Boškoski & Tarčulovski*, Case No. IT-04-82-T, Judgment, ¶ 195).

⁸⁵ Geneva III and Geneva IV, *supra* note 61.

⁸⁶ See, e.g., Jean-Marie Henckaerts, *The Grave Breaches Regime as Customary International Law*, 7 J. INT’L. CRIM. JUST. 683, 685–87 (2009).

⁸⁷ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 35 (2016).

hostilities just based on their status with the enemy's forces.⁸⁸ This can normally be done without any formal process; a uniform or possession of military identification suffices. Those accompanying an armed force, including logisticians and accredited correspondents, are also liable to detention.⁸⁹

Where there is doubt about an individual's status, presumptive classification as a POW is required until a "competent tribunal" can resolve it, but there are no mandates for their composition or procedure.⁹⁰ The United States has traditionally used a three-officer panel near the field of capture to resolve these questions.⁹¹

There are also some limits on the duration of detention. Since the sole legal purpose is to keep captured individuals from rejoining the fight, release is required when an individual no longer poses a credible threat of doing so.⁹² POWs *must* be repatriated, for example, if they are:

- 1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.
- 2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.
- 3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.⁹³

These decisions are not entrusted to the detaining power. Treaty rules call for "mixed medical commissions" comprised of two neutral members and one from the detaining state making decisions by majority vote.⁹⁴ Repatriation can thus be required over the detaining power's objections. Transfer to a neutral country is permitted for POWs whose health would benefit, and direct repatriation or neutral transfer is even encouraged for

⁸⁸ *Id.* at 34–35.

⁸⁹ *See id.*

⁹⁰ Geneva III, *supra* note 61, art. 5.

⁹¹ Solis, *supra* note 42, at 228–31; Brian J. Bill, *Detention Operations in Iraq: A View from the Ground*, 86 INT'L L. STUD. 411, 412–13 (2010).

⁹² INT'L COMM. OF THE RED CROSS, COMMENTARY OF 2020: GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, §4444.

⁹³ Geneva III, *supra* note 61, art. 110.

⁹⁴ *Id.* arts. 112–13, Annex II.

“‘able-bodied’ prisoners who have undergone a long period of captivity.”⁹⁵ The latter does not mean outright release; the neutral is expected to intern them to keep them out of the fight, just as international conflict rules require neutrals to disarm and secure belligerents seeking refuge in their territory.⁹⁶

The Third 1949 Convention reinforces the non-punitive nature of POW detention in detailed mandates about camp conditions, exercise facilities, encouragement of “intellectual, educational, and recreational pursuits,” etc.⁹⁷ It prohibits “close confinement” unless necessary to safeguard the POWs’ own health or when serving disciplinary punishment.⁹⁸

International law provides an alternative means to keep individuals out of the fight while avoiding the costs of captivity for both the state and the POW—“parole.” Under the law of war, parole is a release from preventive detention subject to a strict agreement not to engage in hostilities towards the capturing state. Parole ends either at the end of the conflict or by an exchange for a POW whom the other side holds. If a parole violator is recaptured, he is liable to trial and potentially execution.⁹⁹ Parole has not been used in recent conflicts but is still recognized as a legal option by the Third Geneva Convention, which requires both paroled individuals and their own military to honor faithfully their obligation to stay out of the conflict.¹⁰⁰

Guantánamo critics often expressed concern that there would not be any peace agreement to end the conflict definitively. That would have been an issue in the past; many Axis POWs were held for several years after WWII fighting ended pending actual peace treaties. But states redressed this problem in 1949; the Third Convention now mandates POW release “without delay at the end of *active hostilities*,”¹⁰¹ replacing earlier references to the conclusion of peace. This obligation is unilateral—not contingent upon reciprocal behavior — and its application is determined by “facts on the ground,” not political agreement.¹⁰²

⁹⁵ *Id.* arts. 109–10, Annex I.

⁹⁶ *See, e.g.*, UK MINISTRY OF DEFENCE, *supra* note 42, §§ 1.42–43, 8.147–50, 8.156–158. POWs escaping into neutral territory receive more lenient treatment. *See id.* §§ 8.160–61.

⁹⁷ Geneva III, *supra* note 61, arts. 25–38.

⁹⁸ *Id.* arts. 21, 88–90, 95.

⁹⁹ *See* George Shepard, *Parole*, in *ENCYCLOPEDIA OF PRISONERS OF WAR AND INTERNMENT*, 297, 297–99 (Jonathan Vance ed., 2d ed. 2006).

¹⁰⁰ Geneva III, *supra* note 61, art. 21.

¹⁰¹ *Id.* art. 118 (emphasis added).

¹⁰² INT’L COMM. OF THE RED CROSS, *supra* note 92, §§ 4452–4458.

There is an exception to the release requirement. Individuals who have been criminally charged or convicted need not be repatriated until judicial proceedings conclude, and, if applicable, their sentence.¹⁰³

Eligibility for POW status is specified in Article 4 of the Third Convention.¹⁰⁴ President Bush decided that since al Qaeda and Taliban fighters both generally lacked distinguishing marks, commitment to obey the law of war, and al Qaeda had no established command structure, the United States had no obligation to accord them status as combatants or POWs.¹⁰⁵ But it *could* logically have elected to do so given historical precedents established in the Indian Wars, the Civil War, the Philippine Insurrection, and Vietnam if it concluded that the practical benefits outweighed the costs in terms of legitimating attacks on U.S. forces and limiting prosecutions to actual war crimes.¹⁰⁶

¹⁰³ Geneva III, *supra* note 61, art. 119.

¹⁰⁴ Art. 4, ¶ A of Geneva III, *supra* note 61, defines those persons who are entitled to POW status:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
 (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict... provided that [they] fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) [conduct] their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, [etc.]... provided that they have received authorization from the armed forces which they accompany....

(5) Members of crews... of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

¹⁰⁵ See George W. Bush, U.S. President, Memorandum on the Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), https://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf [<https://perma.cc/9E2K-4U7G>].

¹⁰⁶ For a more detailed discussion of this option, see Glazier, *supra* note 38, at 998–1002. See also Solis, *supra* note 42, at 229 (discussing treatment of Viet Cong as POWs).

If the United States did not want to accord these adversaries POW status, it could have adopted an alternate detention authority that is codified for civilians in the Fourth Geneva Convention. Although the U.S. government asserted that the “illegal combatants” detained at Guantánamo fell into gaps between the Third and Fourth Conventions, it is far more credible to assert that one of the two sets of protections was applicable.¹⁰⁷

2. Detention of Civilians During International Armed Conflict

Although it sounds odd to define enemy fighters as “civilians,” the current law of war classifies anyone who is not a member of a recognized armed force, or otherwise entitled to belligerent immunity, as a “civilian.”¹⁰⁸ Contrary to popular belief, participation in hostilities by individuals lacking belligerent immunity is *not* a war crime.¹⁰⁹ But their lack of immunity leaves them liable to prosecution under ordinary criminal law for *any* violent acts they commit.¹¹⁰ These individuals can also be tried for actual war crimes, such as killing prisoners. The general prohibition against targeting civilians does not apply to those “directly participating in hostilities.”¹¹¹ So the civilian category is not as limiting as one might assume, and there is a compelling legal argument that this is the correct classification for “unprivileged belligerents.”¹¹²

The Fourth Convention provides extensive rules addressing treatment of civilians during armed conflict. While the Fourth Convention focuses on humanitarian protections, it nevertheless also provides authority for the preventive internment of civilians under physical conditions almost identical to those that the Third Convention mandates for POWs.¹¹³

¹⁰⁷ See Bill, *supra* note 91, at 413–17 (articulating the gapless approach and demonstrating its application in U.S. detention operations in Iraq).

¹⁰⁸ This rule is codified in Article 50 of Additional Protocol I, *supra* note 67, which defines anyone who does not qualify for POW status as a civilian. Israel is not a party to this treaty, but the Supreme Court of Israel held the rule applicable to its Palestinian conflict. See H CJ 769/02 Public Committee Against Torture v. Government (2006) (Isr.).

¹⁰⁹ DINSTEIN, *supra* note 87, at 37.

¹¹⁰ *Id.*

¹¹¹ The ICRC has offered interpretative guidance on what constitutes “direct participation” resulting in forfeiture of normal civilian immunity. See generally INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES (Nils Melzer ed., 2009).

¹¹² See Knut Dörmann, *Unlawful Combatants*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 605, 606–13 (2014).

¹¹³ Compare arts. 25–38 of Geneva III, *supra* note 61, with arts. 85–94 of Geneva IV, *supra* note 61.

There are several important distinctions between the two categories. Whereas POW detention, based solely on organizational status, can last for the duration of hostilities, civilian internment requires individual dangerousness determinations. It must be established that “the security of the Detaining Power makes it *absolutely necessary*,”¹¹⁴ or in occupied territory, that it is necessary for “*imperative* reasons of security,”¹¹⁵ to justify internment. Individual POW detentions are reviewed only in cases of doubt, but the Fourth Convention requires that detained civilians have “such action reconsidered as soon as possible by an appropriate court or administrative board” and that follow-on reviews occur “twice yearly . . . with a view to the favourable amendment of the initial decision, if circumstances permit.”¹¹⁶ The Bush administration asserted that an annual review of Guantánamo detentions would provide “more procedural protections than any other captured enemy combatants in the history of warfare.”¹¹⁷ But that would only be true in the case of individuals granted POW status. Israel accords Palestinians that it considers to be unlawful combatants procedural protections consistent with the Fourth Convention, even while formally denying the treaty’s applicability to them.¹¹⁸

Civilian detainees must be released “as soon as the reasons which necessitated . . . internment no longer exist” and in any event, “as soon as possible after the close of hostilities.”¹¹⁹ As with POWs, there is an exception for those convicted of or facing criminal charges.¹²⁰

A primary advantage of treating non-state adversaries as civilians is that it avoids conferring on them the right to engage in hostilities, leaving them liable to prosecution under the local state’s law for any violence they commit, as well as under the law of war for any actual war crimes.

¹¹⁴ Geneva IV, *supra* note 61, art. 42 (emphasis added).

¹¹⁵ *Id.* art. 78 (emphasis added).

¹¹⁶ *Id.* art. 43.

¹¹⁷ Linda Greenhouse, *Guantánamo Detainees Enjoy Historic Protections*, *Administration Says*, N.Y. TIMES (Oct. 11, 2007), <https://www.nytimes.com/2007/10/11/washington/11gitmo.html> [<https://perma.cc/SP8G-UXZ2>].

¹¹⁸ See Dörmann, *supra* note 112, at 619–20 (describing Israel’s 2008 law on incarceration of unlawful combatants).

¹¹⁹ Geneva IV, *supra* note 61, arts. 132–33.

¹²⁰ *Id.* art. 133–43.

D. Detention During Non-International Armed Conflict

While the law of war defines the roles of combatants and civilians in international armed conflicts and provides authority for their detention, the law only sets minimum treatment standards for those not actively participating in non-international hostilities. These consist of Common Article 3's minimalist "humane treatment" standard, which is applicable to any non-international conflict, and more specific rules in Additional Protocol II, which has a higher application threshold. The Protocol only applies to conflicts that:

[T]ake place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.¹²¹

Neither Common Article 3 nor Additional Protocol II provide detention authority, assiduously avoiding use of legally significant terms like "combatant" or "prisoner of war." Any necessary definitions and provision of the requisite authority are thus left to the law of the state where the conflict is taking place.¹²² This arrangement is deliberate; states want the flexibility to decide how best to treat individuals engaged in internal hostilities, which could include prosecuting those individuals as common criminals, or even traitors, under regular domestic law.¹²³

When an outside third state's forces join the fight on the side of the local state, the conflict remains non-international, as the states are both on the same side combatting one or more non-state adversaries. The legal authority for any detention remains the domestic law of the state where the conflict is occurring. The foreign state thus has no independent detention authority, and anyone it captures should be handed over to the local state for disposition in accordance with its national law.¹²⁴

¹²¹ Additional Protocol II, *supra* note 70, art. 1.

¹²² See, e.g., U.K. MINISTRY OF DEFENCE, *supra* note 42, §§ 15.6.1–6.3; see also Knut Dörmann, *Detention in Non-International Armed Conflicts*, 88 INT'L L. STUD. 347, 353 (2012).

¹²³ See DINSTEIN, *supra* note 76, at 220.

¹²⁴ *Id.* at 87–88.

States engaged in non-international conflicts have sometimes chosen to assert authority from international conflicts, such as POW rules or naval blockade rights, particularly when the non-state group controls significant territory or has captured large numbers of government soldiers. In these cases, a “recognition of belligerency” (either explicit or implicit) can initiate even-handed application of international conflict rules to both sides.¹²⁵

Some thoughtful officials now suggest that this process would have been the best way for the United States to proceed after 9/11. For example, then-U.S. Deputy Secretary of Defense for Detainee Affairs William Lietzau opined in 2013 that the United States should have designated the detainees as POWs and applied at least customary international law rules to those detainees. He also presciently suggested that the most effective way to close Guantánamo would be to recognize the end of the armed conflict.¹²⁶

E. Trials Under the Law of War

Although the Lieber Code recognized the authority to try POWs, it said nothing about what standards those trials had to meet, nor did the Hague Land Warfare Regulations, which prohibited the punishment of spies “without previous trial.”¹²⁷ The 1929 Geneva POW Convention provided more substantive protection, specifically limiting trials to “the same courts” and “same procedure” as the detaining authority’s own military personnel.¹²⁸ Unfortunately, the U.S. WWII trials of Axis personnel before military commissions undermined this rule; these commissions took judicial shortcuts, in comparison to the courts-martial used to try American service personnel.¹²⁹ Somewhat perversely, the Supreme Court upheld this departure through a questionable treaty interpretation, holding that the “same courts” rule only applied to POWs tried for *post-capture* offenses, and not for war crimes committed prior to U.S. capture.¹³⁰

¹²⁵ *Id.* at 108–109. Third states could recognize belligerency when their interests were best served by maintaining a formal neutrality towards both sides. *Id.* at 109–111.

¹²⁶ Benjamin Wittes, *A “Jaw-Dropping U-Turn” Story That Isn’t*, LAWFARE (Aug. 7, 2013), <https://www.lawfareblog.com/jaw-dropping-u-turn-story-isnt> [https://perma.cc/D4BM-V59Z].

¹²⁷ Hague Land Warfare Regulations, *supra* note 51, art. 30.

¹²⁸ 1929 POW Convention, *supra* note 57, arts. 63, 87.

¹²⁹ See David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2053–59 (2003).

¹³⁰ *In re Yamashita*, 327 U.S. 1, 20–24 (1946).

The 1949 update of the Geneva POW Convention repudiated this unilateral U.S. interpretation, as the Court itself acknowledged in *Hamdan*.¹³¹ The update retained the 1929 language about trials by the same courts, but a new Article 85 expressly declared that POWs prosecuted for pre-capture offenses retain the rights that the Convention provided.¹³² ICRC commentary makes it clear that this wording was deliberately chosen in awareness of the Supreme Court decision. Thus, “retaining the rights” of a POW now includes the limitation on lawful trial forums.¹³³

The Fourth Convention provides more specific fair trial standards for the civilians that it protects. Occupying powers are expected to keep local courts open, but trials by “non-political military courts” are permitted if they sit in the occupied territory.¹³⁴ The Fourth Convention moreover enumerates an extensive set of fair trial mandates applicable to any court trying a protected civilian. These mandates include, *inter alia*, prompt provision of a list of criminal charges, representation by counsel, a speedy trial, an acceptable interpreter, and a right to appeal or petition for clemency.¹³⁵ Since the United Nations had only adopted the aspirational Universal Declaration of Human Rights the previous year, the Fourth Geneva Convention represents the first actual codification of human rights in a global treaty. Both the Third and Fourth Conventions consider depriving individuals of a “fair and regular trial” to be grave breaches.¹³⁶ Both Conventions also require that time spent in confinement, rather than as part of a general camp population, while awaiting trial be deducted from any sentence awarded.¹³⁷

A core feature of both 1977 Additional Protocols is the incorporation of human rights protections, including fair trial standards. Article 75 of Additional Protocol I establishes baseline treatment standards for anyone not already given specific protections by the Conventions, while Additional Protocol II’s Article 6 provides equivalent rules for anyone tried in a non-international conflict.¹³⁸ Both also mandate that no one can be punished for “any act or omission which did not constitute a criminal offence . . . at the

¹³¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 619–20 (2006).

¹³² Geneva III, *supra* note 61, arts. 85, 102.

¹³³ INT’L COMM. OF THE RED CROSS, *supra* note 91, §3623–27.

¹³⁴ Geneva IV, *supra* note 61, arts. 64, 66.

¹³⁵ *Id.* arts. 71–75.

¹³⁶ Geneva III, *supra* note 61, arts. 129–30; Geneva IV, *supra* note 61, arts. 146–47.

¹³⁷ Geneva III, *supra* note 61, art. 103; Geneva IV, *supra* note 61, art. 69.

¹³⁸ Additional Protocol I *supra* note 67, art. 75; Additional Protocol II, *supra* note 70, art. 6.

time when it was committed.”¹³⁹ The Obama Administration announced in 2011 that Article 75 was recognized as binding customary law.¹⁴⁰

II. THE IMPACT OF THE END OF THE AFGHAN CONFLICT ON GUANTÁNAMO DETENTION

The September 2001 AUMF empowered the president to use “all necessary and appropriate force against those nations, organizations, or persons [who] planned, authorized, committed or aided the [9/11] attacks . . . or harbored such organization or persons.”¹⁴¹ Factually, and hence legally, this authorization only covered al Qaeda and the Afghan Taliban. Subsequent assertions of a “Global War on Terror” exceed the clear statutory language as expressed in the past tense; it is limited to those responsible for completed acts.¹⁴²

Military operations in Afghanistan began October 7, 2001.¹⁴³ The Bush Administration concurrently began planning for military detention and trials. A small cabal, which drafted key documents at the behest of Vice President Dick Cheney, made the critical decisions.¹⁴⁴ Cheney persuaded Bush to sign a controversial “military order,” based on Franklin D. Roosevelt’s 1942 Nazi saboteur trial directive, giving the Department of Defense broad authority for preventive detention and military trials, while purporting to deny detainees *any* judicial access.¹⁴⁵ No al Qaeda or Taliban

¹³⁹ Additional Protocol I, *supra* note 67, art. 75, ¶ 2(c); Additional Protocol II, *supra* note 70, art. 6, ¶ 2(c).

¹⁴⁰ See Hillary Rodham Clinton, U.S. Sec’y of State, Dep’t of State, Reaffirming America’s Commitment to Humane Treatment of Detainees (Mar. 7, 2011), <https://2009-2017.state.gov/secretary/20092013clinton/rm/2011/03/157827.htm> [<https://perma.cc/BXA3-YL8K>].

¹⁴¹ AUMF, *supra* note 3 (emphasis added).

¹⁴² See Glazier, *supra* note 38, at 987–88; *see also* AUMF, *supra* note 3, § 2(a), which reads in its entirety:

- (a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

¹⁴³ CFR, *supra* note 6.

¹⁴⁴ See, e.g., James P. Pfiffner, *Policy Making in the Bush White House*, 21 ISSUES IN GOVERNANCE STUD. 6–12 (Oct. 2008).

¹⁴⁵ Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002), *reprinted as amended in* 10 U.S.C. § 801 (2012).

members were yet in custody, and ideas about who would be captured or what charges they might face were still purely conjectural. But Cheney, his counsel David Addington, and Justice Department lawyer John Yoo claimed that the “rough justice” associated with military tribunals was sufficient for U.S. enemies.¹⁴⁶ They sought to expedite trials by denying the due process provided in Article III courts or courts-martial. Guantánamo Bay was selected as the site for detention and military trials in the hope that it would sit beyond the jurisdiction of U.S. federal courts.¹⁴⁷

The vision failed to pan out. Recycling FDR’s purported denial of judicial access was legally indefensible. The Supreme Court had categorically rejected the plan by convening a special July term to hear *Ex parte Quirin*, a constitutional challenge to the Nazi saboteur trial.¹⁴⁸ So it should not have been surprising that the Court would now weigh in against some of the more extreme Bush Administration efforts. By the end of Bush’s second term, the Court had:

- (1) given conditional approval to the exercise of law of war detention (*Hamdi v. Rumsfeld*);¹⁴⁹
- (2) determined that Guantánamo detainees could bring habeas challenges to their detention in federal court (*Rasul v. Bush*);¹⁵⁰
- (3) overturned the initial military commission process (*Hamdan v. Rumsfeld*);¹⁵¹ and
- (4) decided that Guantánamo detainees had a constitutional right to seek habeas review in U.S. courts when Congress endeavored to overturn *Rasul* by statute (*Boumediene v. Bush*).¹⁵²

The Court had not decided *Hamdan* on constitutional grounds, so it was amenable to statutory rectification. Bush responded quickly, announcing the transfer of “high value” detainees from previously secret CIA “black sites” to Guantánamo, and demanding Congress immediately authorize their

¹⁴⁶ See BRAVIN, *supra* note 16, at 6–7, 40–47.

¹⁴⁷ See *id.* at 74–76.

¹⁴⁸ See *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁴⁹ 542 U.S. 507 (2004) (plurality opinion).

¹⁵⁰ 542 U.S. 466 (2004).

¹⁵¹ 548 U.S. 557 (2006) (holding that the commissions failed to meet the minimum standards of Common Article 3 and that the administration had not adequately justified departing from the Uniform Code of Military Justice’s procedural rules for courts-martial).

¹⁵² 553 U.S. 723 (2008).

trial.¹⁵³ The resulting Military Commissions Act of 2006 codified the tribunals' jurisdiction and procedure, and the offenses they could try.¹⁵⁴ It also attempted to deprive Guantánamo detainees of access to habeas review, but the Court's *Boumediene* decision repudiated that effort.¹⁵⁵ The Act was reenacted with modest improvement in 2009 following President Obama's decision to continue commission use.¹⁵⁶

Although the initial invocation of law of war authority was likely legitimate, the continued use of detention authority is problematic; there is real reason to believe that the authority ended well before the final U.S. withdrawal began. A key issue is the classification of the Afghan conflict as events unfolded beyond the initial intervention. The classification can change over time and is an essential element in determining detention authority, what war crimes can be prosecuted, and even the endpoint for law of war application.

This Part now turns to assessing the Afghan conflict classification over the course of the U.S. intervention. It then examines the resulting limits on, and endpoint of, U.S. law of war authority. As will be seen, U.S. detention authority likely should have legally ended with the unacknowledged transition of the Afghan conflict from international to non-international, at least by mid-2005. This Part concludes by examining the ramifications that the war's ultimate end has on Guantánamo detention.

A. *Classification of the Afghan Conflict*

Despite its ambiguous legal status in 2001, the Taliban was at least the *de facto* government of Afghanistan, and the U.S. intervention launched an international conflict. President Bush personally acknowledged that classification and that both the United States and Afghanistan were parties to the 1949 Geneva Conventions. But he declared in a February 2002 memo that the Conventions failed to protect either al Qaeda, which was not a state and

¹⁵³ Off. of the Press Sec'y, The White House, *President Discusses Creation of Military Commissions to Try Suspected Terrorists* (Sept. 6, 2006), <http://georgewbush-whitehouse.archives.gov/news/releases.html> [<http://perma.cc/XXV7-C25M>].

¹⁵⁴ Military Commissions Act of 2006, 10 U.S.C. §§ 948a (2006).

¹⁵⁵ *Boumediene*, 553 U.S. at 723.

¹⁵⁶ Military Commissions Act of 2009, 10 U.S.C. §§ 948a (2009).

thus could not be a treaty party, or the Taliban fighters, who were “unlawful combatants.”¹⁵⁷

That memo was arguably the high point of clarity in the U.S. government’s approach—from any of the three branches. Even for those disputing its conclusions, the memo at least clearly stated what the Administration thought the law was. When the Supreme Court considered the government’s detention authority in its 2004 *Hamdi* plurality decision, the discussion of detention authority was less explicit but still logically based on the law of international armed conflict.¹⁵⁸ This inference derives both from the substantive content of the discussion and the citations to international law sources, including the text of the Third Geneva Convention.¹⁵⁹

Unfortunately, the Court induced significant uncertainty about the legal classification of the conflict two years later in its *Hamdan* decision halting the military commission trials. That holding is partly based on finding that the Guantánamo tribunals failed to qualify as the “regularly constituted court[s]” that Common Article 3 mandated, and further suggested that conflict with a non-state adversary like al Qaeda must literally be “not of an international character.”¹⁶⁰

It is possible that the Court was applying Common Article 3 as a minimum legal standard applicable to any hostilities, rather than definitively holding this conflict to be non-international, so that it “need not decide the merits” of whether the full Conventions applied to Hamdan.¹⁶¹ Nevertheless, it subsequently became common practice to describe the conflict as non-international, and the Obama Administration would take full advantage, making a public relations show of having officials verify that Guantánamo detention complied with Common Article 3.¹⁶² That effort was largely meaningless given its minimalist requirement of “humane” treatment.

Treating the conflict as non-international undermines U.S. claims to draw detention authority from the law of war, as all three branches purport to do. If the *Hamdan* Court really deemed the conflict non-international, it

¹⁵⁷ See Bush, *supra* note 105. But even if the Geneva Conventions are facially inapplicable to a conflict, most provisions are binding as customary law. See, e.g., SOLIS, *supra* note 39, at 81–82.

¹⁵⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

¹⁵⁹ *Id.* at 518–21.

¹⁶⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–33 (2006).

¹⁶¹ *Id.* at 629.

¹⁶² See, e.g., U.S. DEP’T OF DEF., REVIEW OF DEPARTMENT COMPLIANCE WITH PRESIDENT’S EXECUTIVE ORDER ON DETAINEE CONDITIONS OF CONFINEMENT (2009).

undercut the validity of the detention authority that it upheld two years previously in *Hamdi*. The Obama Justice Department at least implicitly recognized this issue, asserting in a 2009 court filing that:

Principles derived from law-of-war rules governing *international armed conflicts*, therefore, *must* inform the interpretation of the detention authority Congress has authorized for the current armed conflict. Accordingly, under the AUMF, the President has authority to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks. The President also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.¹⁶³

There are two flaws to this approach. First, if international armed conflict rules provided the underlying authority, then any applicable rules should not have just “informed” detention policy; they should have regulated it.¹⁶⁴ That would mean respecting rules like the prohibitions against prison-based facilities and coercive interrogation.¹⁶⁵ And the military’s plans for hospice care and wheelchair ramps at Guantánamo make little sense given law of war mandates that individuals whose health is declining must be released.¹⁶⁶ Drawing authority from a *corpus juris* without complying with its concurrent restrictions mocks the notion of law.

A second issue is even more important for the subject of this Article: How long after its Afghan intervention was the United States still justified in

¹⁶³ Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1-2, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. Mar. 13, 2009) (emphases added).

¹⁶⁴ See e.g., Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> [<https://perma.cc/4RF2-WNSK>].

¹⁶⁵ See *id.*

¹⁶⁶ See Carol Rosenberg, *Guantánamo Bay as Nursing Home: Military Envisions Hospice Care as Terrorism Suspects Age*, N.Y. TIMES (Apr. 27, 2019), <https://www.nytimes.com/2019/04/27/us/politics/guantanamo-bay-aging-terrorism-suspects-medical-care.html> [<https://perma.cc/N3RG-4JQL>].

treating the conflict as an international armed conflict? The most fundamental U.S. legal error was arguably continuing unilateral detention operations well after it lost that authority.

1. Iraq as a Model for Understanding Conflict Classification

Afghanistan was not the only protracted U.S. conflict during this period. The 2003 invasion of Iraq lacked UN authorization, was based on false premises, and is now widely recognized as a *jus ad bellum* violation.¹⁶⁷ Despite the high-profile Abu Ghraib abuses, the government did a much better job of identifying the applicable conflict classification and conforming its detention policies to international law there than it did in Afghanistan.

There is no dispute that the Iraq invasion launched an international armed conflict. The United States detained Iraqi military personnel as POWs while holding other individuals “for imperative reasons of security” under Article 78 of the Fourth Convention during the initial period of hostilities.¹⁶⁸ U.S. leaders in Washington, D.C. sought to portray the American role as one of “liberators” rather than “occupiers” and deliberately avoided the latter term.¹⁶⁹ Nevertheless, the United States established the Coalition Provisional Authority (CPA) to govern Iraq after the initial fighting ended, and it continued to apply international armed conflict rules, including the 1949 Conventions, which remain applicable to military occupation.¹⁷⁰

The CPA exercised governmental authority for a year, until a new UN-recognized Iraqi government resumed the exercise of sovereignty in June 2004. The residual conflict, combatting a growing insurgency, then legally became a non-international conflict. In this singular case, however, U.S. forces uniquely retained independent detention authority for several more years, but *only* because the UN Security Council recognition of restored Iraqi sovereignty granted this exception at Iraq’s request.¹⁷¹ Its Resolution 1546 authorized the U.S.-led multinational force “to take *all necessary measures* to contribute to the maintenance of security and stability in Iraq.”¹⁷²

¹⁶⁷ See, e.g., Ewen MacAskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, Says Annan*, GUARDIAN (Sept. 15, 2004), <https://www.theguardian.com/world/2004/sep/16/iraq.iraq> [<https://perma.cc/3V29-XBTJ>].

¹⁶⁸ See Bill, *supra* note 90, at 412–14.

¹⁶⁹ David Glazier, *Ignorance Is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 121, 188–89 (2005).

¹⁷⁰ Bill, *supra* note 91, at 414–15.

¹⁷¹ Alexandra Perina, *Legal Bases for Coalition Combat Operations in Iraq, May 2003–Present*, 86 INT’L L. STUD. 81, 86–87 (2010).

¹⁷² S.C. Res. 1546, ¶¶ 9–10 (June 8, 2004) (emphasis added).

Resolving any doubt into whether these measures included detention, the resolution made specific reference to attached letters from Iraqi and U.S. officials explaining that the U.S. role would include both combat operations and internment.¹⁷³ The threats that the United States confronted were from non-state entities fairly classified as “unprivileged belligerents,” but throughout this period U.S. detention decision processes effectively conformed to the Fourth Convention rules for civilian internment.¹⁷⁴

After several extensions, the UN mandate ended on the last day of 2008, and at that point detention reverted to a traditional non-international conflict scheme “based on criminal detention overseen by the Iraqi judiciary.”¹⁷⁵ U.S. forces in Iraq continued to hold some prisoners until 2010.¹⁷⁶ These detention practices were based on a bilateral agreement providing that “[n]o detention or arrest may be carried out by the United States Forces [other than of Americans] except through an Iraqi decision issued in accordance with Iraqi law.”¹⁷⁷

2. Afghanistan—The Factual and Legal Situation

The conflict in Afghanistan must logically have undergone a similar transition to that of Iraq, becoming non-international following the creation of a new sovereign Afghan government. But the precise timing is less clear.

The Taliban had already suffered a series of significant defeats by mid-November 2001 when UN Security Council Resolution 1378 called for a “transitional administration” as a first step towards the creation of a new “broad-based, multi-ethnic and fully representative” government.¹⁷⁸ Following the Taliban’s loss of the capital Kabul, a UN conference in Bonn, Germany secured an agreement to establish an “Interim Administration” as of December 22, 2001, which would be the effective government and

¹⁷³ *Id.* ¶¶ 9–11; Letter from Colin Powell, U.S. Sec’y of State, to Lauro Liboon Baja, Jr., President of UN Sec. Council (June 5, 2004) (annexed to S.C. Res. 1546).

¹⁷⁴ See Bill, *supra* note 91, at 418–35 (describing U.S. detention review procedures).

¹⁷⁵ *Id.* at 416–17.

¹⁷⁶ Jim Loney, *U.S. Transfers Prison, 2,900 ex-Insurgents to Iraq*, REUTERS (Mar. 15, 2010), <https://www.reuters.com/article/us-iraq-usa-detainees/u-s-transfers-prison-2900-ex-insurgents-to-iraq-idUSTRE62E36520100315> [<https://perma.cc/7KF9-FY68>].

¹⁷⁷ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Iraq-U.S., art. 22, ¶ 1, Nov. 17, 2008.

¹⁷⁸ CFR, *supra* note 6; S.C. Res. 1378, ¶ 1 (Nov. 14, 2001).

representative of Afghanistan in external affairs.¹⁷⁹ However, this measure was only provisional. The agreement called for an Emergency Loya Jirga to meet within six months to decide on a “Transitional Authority” to serve up to two more years, “until such time as a fully representative government can be elected through free and fair elections.”¹⁸⁰ UN Security Council Resolution 1383 endorsed the Bonn Agreement the next day.¹⁸¹ Two weeks later, the Council approved the creation of an International Security Assistance Force (ISAF) to support the Interim Authority in maintaining security in the capital environs, approving use of “all necessary measures” to fulfill its mandate.¹⁸² Although this addition may include detention, it extended only to what was then a very geographically constrained, European-led, force; the Security Council never granted the same authorization to U.S. forces.

The Emergency Loya Jirga met in June 2002, selecting Hamid Karzai to head the Transitional Authority.¹⁸³ The Security Council “welcome[d]” this development and identified Karzai as the “Head of State,” but it consistently referred to the “Transitional Authority” for the next few years, declining to call it the “Government of Afghanistan.”¹⁸⁴

ICRC legal expert Knut Dörmann considers these events sufficient to mark the legal transition from international to non-international conflict in 2002.¹⁸⁵ Recognition of an Afghan head of state and assumption of functional government authority by Afghani nationals support this conclusion. Nonetheless, the lack of an Afghan constitution and deliberate Security Council choice not to term the interim authority as the “Government” could also signify that Afghanistan still lacked the necessary domestic legal structure to support a conflict transition at that point.

Subsequent events provide evidence that the conflict transitioned from international to non-international by mid-decade. On May 1, 2003, U.S. Defense Secretary Donald Rumsfeld announced that “major combat” was

¹⁷⁹ See Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions art. 1, ¶¶ 1–3, U.N. Doc. S/2001/1154 (Dec. 5, 2001).

¹⁸⁰ Letter Dated 5 December 2001 from the Sec’y Gen. Addressed to the President of the Sec. Council, U.N. Doc. S/2001/1154 (Dec. 5, 2001).

¹⁸¹ S.C. Res. 1383, ¶ 1 (Dec. 6, 2001) (endorsing the Bonn Agreement).

¹⁸² S.C. Res. 1386, ¶ 1 (Dec. 20, 2001) (authorizing establishment of the ISAF).

¹⁸³ S.C. Res. 1419, ¶ 3 (June 26, 2002).

¹⁸⁴ *Id.* ¶ 2. See also, e.g., S.C. Res. 1471 (Mar. 28, 2003); S.C. Res. 1536 (Mar. 26, 2004).

¹⁸⁵ Dörmann, *supra* note 122, at 354.

over in Afghanistan.¹⁸⁶ In January 2004, Afghanistan adopted a new constitution and in October, Karzai was elected president in the first national election held since 1969; parliamentary elections took place the next year.¹⁸⁷ The UN Security Council dropped its use of “Transitional Authority” and began referring exclusively to the “Government of Afghanistan” in its resolutions in March 2005.¹⁸⁸ On May 23 of that year, Bush and Karzai publicly issued a Joint Declaration defining the U.S.-Afghan strategic partnership.¹⁸⁹ It confirmed that U.S. forces would have continued access to Bagram Air Base and have the “freedom of action required to conduct appropriate military operations based on consultations and pre-agreed procedures.”¹⁹⁰ The language is consistent with U.S. forces operating by invitation in support of an Afghan government-led non-international conflict. The only reference to detention authority is a statement that “the Afghan Government intends to maintain capabilities for the detention, as appropriate, of persons apprehended in the War on Terror.”¹⁹¹ There is no mention of *any* independent U.S. detention authority, implying that it no longer existed at that time.

B. Trump’s Agreement with the Taliban as an Alternate Endpoint

While it initially seemed inconceivable that a conflict against al Qaeda or the Taliban would see a peace agreement, the Trump Administration did in fact strike a unilateral deal with the latter group. In a February 29, 2020 agreement concluded in Doha, Qatar, the United States agreed to:

1. Withdraw all U.S. and coalition military forces and supporting civilians from Afghanistan within fourteen months (i.e., by May 2021);¹⁹²

¹⁸⁶ CFR, *supra* note 6.

¹⁸⁷ *Id.*

¹⁸⁸ S.C. Res. 1589, ¶¶ 3, 4, 6–7, 12 (Mar. 24, 2005) and all subsequent resolutions on Afghanistan use the term “Government of Afghanistan” when referring to the central authority.

¹⁸⁹ George W. Bush & Hamid Karzai, Joint Declaration of the United States-Afghanistan Strategic Partnership (May 23, 2005), <https://www.govinfo.gov/content/pkg/WCPD-2005-05-30/pdf/WCPD-2005-05-30-Pg863.pdf> [<https://perma.cc/KHX4-P472>].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the

2. Have “[u]p to” 5,000 Taliban prisoners released by March 10, 2020 in exchange for “up to” 1,000 government personnel whom the Taliban held;¹⁹³
3. Review U.S. sanctions against the Taliban with a goal of removing them by August 27, 2020;¹⁹⁴
4. Engage in diplomatic efforts to end UN Security Council sanctions against the members of the Taliban by May 29, 2020;¹⁹⁵ and
5. “[R]efrain from the threat or the use of force against the territorial integrity or political independence of Afghanistan or intervening in its domestic affairs.”¹⁹⁶

In exchange for the United States ending outside participation in the war and directing a prisoner exchange favoring it by a 5:1 ratio, the Taliban only promised “to prevent any group or individual, including al-Qa’ida, from using the soil of Afghanistan to threaten the security of the United States and its allies.”¹⁹⁷

The Supreme Court has recognized presidential authority to legally bind the United States by reaching non-treaty “executive agreements” with foreign states based on his constitutionally implied “lead” role in foreign policy.¹⁹⁸ Although the Taliban was not a state—as the 2020 agreement plainly declares—Article II’s explicit conferral of the commander-in-chief power on the president suggests that an agreement of this type should be squarely within executive authority.¹⁹⁹

The 1972 Case-Zablocki Act recognized presidential authority to conclude binding non-treaty agreements, just requiring that the Secretary of State:

[T]ransmit to the Congress the text of any international agreement . . . other than a treaty, to which the United States

Taliban and the United States of America, Feb. 29, 2020, Part One, B [hereinafter Agreement for Bringing Peace to Afghanistan].

¹⁹³ *Id.* Part One, C.

¹⁹⁴ *Id.* Part One, D.

¹⁹⁵ *Id.* Part One, E.

¹⁹⁶ *Id.* Part One, F.

¹⁹⁷ *Id.* Part Two.

¹⁹⁸ *See, e.g.,* *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Am. Ins. Ass’n. v. Garamendi*, 539 U.S. 396 (2003).

¹⁹⁹ *See* Agreement for Bringing Peace to Afghanistan, *supra* note 192; U.S. CONST., art. II, § 2, cl. 1.

is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.²⁰⁰

New York Times reporting suggests that the Trump Administration promptly provided the agreement to Congress, including classified annexes spelling out the criteria for assessing Taliban compliance.²⁰¹ Further confirmation that the Trump Administration had reported the agreement is found in the text of a proposed amendment to the 2021 National Defense Authorization Act. Drafted by Democratic Senator Robert Menendez and Republican Todd Young, it called upon the Administration “to *continue* to submit . . . materials relevant to the February 29 agreement” to the “appropriate congressional committees.”²⁰²

If the earlier transition from an international to a non-international conflict in Afghanistan somehow failed to end AUMF-derived detention authority, this agreement would logically have established the legal endpoint as being the timeframe that the United States was committed to cease all participation in Afghan hostilities (i.e., May 2020).

C. Constitutional Limits on Law of War Detention

There is no international mechanism able to compel U.S. compliance with law of war detention constraints. The United States no longer accepts

²⁰⁰ 1 U.S.C. § 112b(a).

²⁰¹ David E. Sanger et al., *A Secret Accord with the Taliban: When and How the U.S. Would Leave Afghanistan*, N.Y. TIMES (Mar. 8, 2020), <https://www.nytimes.com/2020/03/08/world/asia/taliban-afghanistan-annexes-peace-agreement.html> [<https://perma.cc/F898-HW6X>].

²⁰² 166 CONG. REC. S3229–30 (daily ed. June 24, 2020) (text of SA 1704) (emphasis added). Apparently, no floor action on the amendment ever took place. See *S.Amdt.1704 to S.4049*, CONGRESS.GOV (June 24, 2020), <https://www.congress.gov/amendment/116th-congress/senate-amendment/1704> [<https://perma.cc/YSV8-WHJZ>].

the compulsory jurisdiction of the International Court of Justice and has previously ignored adverse decisions regardless.²⁰³

Realistically, then, one of the three U.S. government branches would have to mandate a change (or end) to Guantánamo detention. Congress could terminate the AUMF authority that provides the legal basis for detention or use its power over the purse to cut off funding for Guantánamo.²⁰⁴ The president could reach a peace accord as an executive agreement (as Trump seems to have done) or recognize the obvious facts on the ground and determine that the conflict had transitioned to a non-international status or ended (as Biden did). In either case, it would then be his responsibility as chief executive/commander-in-chief to order the end of detention in compliance with his constitutional mandate to “take care that the laws be faithfully executed” (as neither did).²⁰⁵ In a conflict against an actual sovereign state, the president could negotiate, and the Senate could give its advice and consent to, an actual peace treaty. Alternatively, the federal courts could rule—most likely in response to a habeas challenge to a Guantánamo detention or military commission trial—that the previously recognized detention authority had run its course.

The presidential and congressional options would be political choices, and either Trump’s 2020 deal with the Taliban or Biden’s August 31, 2021 proclamation that “[I]ast night in Kabul, the United States ended 20 years of war in Afghanistan—the longest war in American history” should be considered dispositive.²⁰⁶ This Section, however, focuses on the basis for a judicial determination that detention authority has expired by applying the limits that the Court identified in its 2004 *Hamdi v. Rumsfeld* plurality decision.

²⁰³ See Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, in *THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* 46, 46 (Cesare P.R. Romano ed., 2009).

²⁰⁴ See U.S. CONST. art. I, § 9, cl. 7 (requiring congressional appropriations for federal expenditures); U.S. CONST. art I, § 8, cl. 11 (giving Congress the power to declare war). See also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (discussing congressional authority and the AUMF’s legal significance).

²⁰⁵ See U.S. CONST. art. II, § 1, cl. 1; § 2, cl. 1; § 3.

²⁰⁶ Joseph Biden, President, White House, Remarks by President Biden on the End of the War in Afg. (Aug. 31, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/> [https://perma.cc/3PE7-QK2N].

This case had unique aspects. The detainee Yaser Esam Hamdi was a U.S. citizen by having been born in Louisiana. He was raised in Saudi Arabia before traveling to Afghanistan where the Northern Alliance captured him—reportedly with rifle in hand—and turned him over to U.S. forces. Afterwards, U.S. forces brought him to Guantánamo in January 2002. After discovering that Hamdi was an American, the military transferred him to the United States, where he ended up in the Navy brig in Charleston, South Carolina.²⁰⁷

Hamdi's citizenship and presence in the country required addressing the "Non-Detention Act," providing that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."²⁰⁸ The result was a divided decision. Justice Thomas would have given the government essentially *carte blanche* to detain Hamdi without judicial review based on its unilateral determination that he was an enemy combatant.²⁰⁹ At the other extreme, a joint dissent by Justices Scalia and Stevens argued that the government must either bring criminal charges or suspend the writ of habeas corpus to detain an American in the United States.²¹⁰ Justices Souter and Ginsberg took a more moderate approach, arguing that Hamdi's detention was troublesome given the lack of explicit detention authority in the AUMF and the U.S. failure to treat him as a POW in compliance with the Third Geneva Convention.²¹¹

But it was Justice O'Connor's plurality opinion that became the opinion of the Court.²¹² It held that the authorization of military force against the Taliban and al Qaeda included implied authority for the detention of opposing fighters, which "by universal agreement and practice are important incidents of war."²¹³ The opinion noted that it was entirely non-punitive, serving only to prevent the detainee from further participation in hostilities.

²⁰⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality opinion).

²⁰⁸ 18 U.S.C. § 4001 (1948).

²⁰⁹ *See Hamdi*, 542 U.S. at 592–93 (Thomas, J., dissenting).

²¹⁰ *Id.* at 554–56 (Scalia, J., dissenting).

²¹¹ *See id.* at 548–50 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

²¹² Chief Justice Rehnquist and Justices Breyer and Kennedy formally joined Justice O'Connor's plurality opinion, but coupled with Justice Thomas's more expansive view of governmental authority, it effectively commanded majority support. *Id.* at 509–39 (O'Connor, J., plurality opinion for the Court).

²¹³ *Id.* at 518 (O'Connor, J., plurality opinion for the Court, quoting *Ex parte Quirin*) (cleaned up).

It stated that detained individuals must be “treated humanely, and in time exchanged, repatriated, or otherwise released.”²¹⁴

The plurality opinion responded directly to concerns about “indefinite detention” becoming generational since the government acknowledged that the conflict was “unlikely to end with a formal cease-fire agreement.”²¹⁵ The Court declared that “[i]t is a clearly established principle of the law of war that detention may last no longer than *active hostilities*,” adopting the 1949 Geneva standard.²¹⁶ The Court thus held that as long as U.S. “troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of ‘necessary and appropriate force,’ and therefore are authorized by the AUMF.”²¹⁷

None of the Justices took a very sophisticated approach to the law of war; no opinion addressed the distinctions between international and non-international conflict, nor the impact that a transition would have on U.S. detention authority. Yet that transition almost certainly took place soon after *Hamdi* was decided, if it had not already done so.²¹⁸

Federal courts might be reluctant to apply international law faithfully and recognize that unilateral U.S. Guantánamo detention authority ended at least fifteen years ago.²¹⁹ But as of August 2021, a presidentially authorized “peace agreement” has been concluded, and U.S. troops are no longer engaged in combat in Afghanistan. Moreover, the total collapse of the U.S.-supported Afghan government has ended the conflict entirely.²²⁰ So by *Hamdi*’s plain language, U.S. detention authority under the AUMF has now come to an absolute end.

D. Could There Be Separate Ongoing Conflicts Against al Qaeda et al.?

While it may be tempting to argue that Guantánamo detention can continue beyond the end of active combat operations in Afghanistan because

²¹⁴ *Id.* at 518–19 (quoting *In re Territo*, 156 F.2d 142, 145 (C.A.9 1946)).

²¹⁵ *Id.* at 5–20 (quoting the Brief for Respondents).

²¹⁶ *Id.* at 520 (citing the Third Geneva Convention) (emphasis added).

²¹⁷ *Id.* at 521.

²¹⁸ *See id.* at 516–525 (Discussion in Part II).

²¹⁹ *See Al-Bihani v. Obama*, 590 F.3d 866, 871 (2010). *But see Hamdi*, 542 U.S. at 507; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²²⁰ *See* David Zucchino, *Kabul’s Sudden Fall to Taliban Ends U.S. Era in Afghanistan*, N.Y. TIMES (Aug. 15, 2021), <https://www.nytimes.com/2021/08/15/world/asia/afghanistan-taliban-kabul-surrender.html> [<https://perma.cc/ZS6A-T2CL>].

one or more separate U.S. conflict(s) remain ongoing, that approach is flawed as a matter of both international and U.S. constitutional law.

1. International Law Precludes a U.S. v. al Qaeda Conflict

The classic concept of Westphalian sovereignty is still the defining feature of international law in the twenty-first century, reflected in its bifurcation of armed conflicts into international and non-international. With only two exceptions inapplicable to al Qaeda—wars of national liberation or the recognition of belligerency—an international conflict requires at least one sovereign state on each side.²²¹ The “theater of war” or “operations” is the national territory of the warring parties and international waters and airspace. Principles of sovereignty bar conducting hostilities in the territory of non-participating states.²²²

Modern conflicts are often complex, frequently involving one or more non-state parties in addition to the principal sovereign belligerents. But that does not alter the core requirement that there be a state on both sides. The initial U.S. invasion of Afghanistan constituted an international conflict, which could be characterized as the U.S. v. Afghanistan (the Taliban) with al Qaeda as an associated force. But since al Qaeda is not a state, the United States cannot be in an international conflict against that group alone.²²³

Sovereignty also plays a core function in the law governing non-international conflicts. Common Article 3 of the 1949 Geneva Conventions applies to conflict “in the territory of *one* of the High Contracting Parties.”²²⁴ It may be tempting to read that as “at least one,” implying that a non-international conflict can be transnational, but that reading would be inconsistent with the law’s foundation. A defining feature of non-international conflicts is their situs in the sovereign territory of a state that enjoys a monopoly over the right to regulate the use of violence there. Whether the conflict is between that state and a non-state opponent—

²²¹ See SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 10–20, 212–222 (2012) (discussing recognition of belligerency and wars of national liberation).

²²² Jean-Christophe Martin, *Theater of Operations*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 752, 758–59 (Marc Weller, ed. 2015).

²²³ See Bush, *supra* note 157 (Implied the existence of separate international conflicts against the Taliban and al Qaeda. But that cannot have been correct, as it says that al Qaeda was not a state and thus could not be party to the treaties, indicating that the group cannot be a “party” to an international conflict. At most, al Qaeda might be able to participate alongside a co-belligerent state).

²²⁴ 1949 Geneva Conventions, *supra* note 61 (emphasis added).

insurgents, rebels, dissident armed forces, etc., or non-state groups battling each other—the local state’s domestic law governs. The local state has the sole legal authority to determine who is authorized to use force, and how it wants to deal with the participants. It can decide, based on its own constitution and domestic legislation, whether to grant participants full amnesty, preventively detain them, detain and prosecute them as common criminals, or try them for treason.

Additional Protocol II confirms this understanding through more recent language declaring its applicability to conflicts “which take place in the territory of a High Contracting Party” against an armed group that exercises control over part of its territory.²²⁵ This declaration again confirms the centrality of the state’s sovereignty over its territory as an essential factor for the existence of a non-international conflict. Unless al Qaeda or other non-state militant groups relocated to the United States, at best U.S. forces could be partners in a conflict against them with the country where they are found.²²⁶ Furthermore, the intervention must be with the permission of the local state, or else it would constitute an act of aggression against it.²²⁷ American efforts against al Shabaab in Somalia, for example, make it a participant in a local conflict alongside that state, but cannot constitute a source of unilateral U.S. detention authority.²²⁸

International law poses a second distinct barrier to considering the United States to be in a non-international conflict against al Qaeda: the capabilities and actions of that group no longer reach the level at which it can be considered a participant in an armed conflict at all. Since the group was driven out of its Afghan camps and its leadership subjected to a series of “decapitation” strikes, it lacks the requisite degree of organization to qualify as a conflict participant. President Biden specifically declared in his remarks announcing the end of U.S. involvement in Afghanistan that “[a]l Qaeda was decimated” after the killing of Osama bin Laden a decade earlier.²²⁹

²²⁵ Additional Protocol II, *supra* note 70, art. 1, ¶ 1 (emphasis added).

²²⁶ See Andrew Beshai, *The Boundless War: Challenging the Notion of a Global Armed Conflict Against al-Qaeda and Its Affiliates*, 48 LOY. L.A. L. REV. 829, 841–45 (2015).

²²⁷ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, Rome Statute of the International Criminal Court art. 8 *bis*, U.N. Doc. A/CONF.183/9* (July 17, 1998), 37 I.L.M. 999 (1998).

²²⁸ See PAUL D. WILLIAMS, UNDERSTANDING US POLICY IN SOMALIA: CURRENT CHALLENGES AND FUTURE OPTIONS 16 (July 2020), <https://www.chathamhouse.org/sites/default/files/publications/research/2020-07-14-us-policy-somalia-williams.pdf> [<https://perma.cc/AWY6-YDRG>].

²²⁹ Biden, *supra* note 206.

Moreover, the group has failed to sustain the level of ongoing hostilities necessary to satisfy the continuing violence threshold for a non-international conflict. It would lack credibility to assert that the United States could unilaterally bootstrap itself into a continuing armed conflict by periodically conducting aerial strikes with complete impunity on relatively ineffectual al Qaeda remnants.

2. Constitutional Considerations Preclude a Separate Conflict

Although the Cheney-led group providing the intellectual firepower for the launch of operations in Afghanistan and Iraq asserted an extraordinarily broad view of executive authority, President Bush exercised relative restraint. Ultimately, he sought and received explicit congressional authorizations for both interventions, consistent with the constitutional mandate that Congress has the power to decide when and where the United States may use military force.²³⁰

It is thus ironic that his more liberal successor and former constitutional law professor Barack Obama was responsible for more substantial expansions of U.S. use of force beyond its congressionally authorized limits.²³¹ The facial language of the AUMF precludes its expansion to cover other “associated forces”; the text only authorizes military force against those responsible for 9/11 and those who harbored them.²³² If there were any initial doubt as to whom it covered, that only meant more detective work might be required. The AUMF precludes expansion to groups like al Shabaab, al Qaeda in the Arabian Peninsula, or ISIS that did not exist on 9/11, let alone play any role. Since the “core” al Qaeda is no longer capable of constituting an armed conflict adversary, the Constitution compels the same conclusion as international law does. Any residual law of war authority under the AUMF, including preventive detention, has ended with the conclusion of the conflict in Afghanistan.

²³⁰ AUMF, *supra* note 3; Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, Pub. L. 107–243 (2002), 116 Stat. 1498; Bradley & Goldsmith, *supra* note 204.

²³¹ See Charlie Savage, Eric Schmitt & Mark Mazzetti, *Obama Expands War with Al Qaeda to Include Shabab in Somalia*, N.Y. TIMES (Nov. 27, 2016), <https://www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html> [<https://perma.cc/F6MY-DVPU>].

²³² See AUMF, *supra* note 3.

Part III will now consider the impact of the end of hostilities on military commission prosecutions. As a sovereign nation, the United States logically enjoys the rights and authority that international law grants even if the Constitution does not explicitly enumerate those powers. But the Supreme Court has held that the exercise of authority derived from international law is subject to any constraints that law imposes.²³³

III. THE IMPACT OF THE END OF THE AFGHAN CONFLICT ON THE GUANTÁNAMO MILITARY COMMISSION TRIALS

By any objective measure, the Guantánamo military commissions have not been a success.²³⁴ In 2006, the Supreme Court found that their initial procedures failed to meet minimal law of war standards and halted them in *Hamdan v. Rumsfeld* before a single case had reached judgment.²³⁵ Bush responded by transferring “high value” detainees to Cuba from previously undisclosed CIA “black sites” and demanding that Congress authorize their trial, which it did in the 2006 Military Commissions Act (MCA).²³⁶ Only three bit players were “convicted” over the next two years, and the D.C. Circuit Court of Appeals later invalidated most of their charges.²³⁷

Obama was justly critical of the commissions, declaring that federal courts could better bring “swift and sure justice to terrorists,” so his election predicted their imminent demise.²³⁸ Nevertheless, he unexpectedly reinvigorated them, getting Congress to enact an updated 2009 MCA.²³⁹ Five more cases were resolved via plea deals during his tenure.²⁴⁰ As of April 2022, a total of ten defendants were awaiting trial.²⁴¹

The Office of Military Commission’s annual budget appropriation now exceeds \$130 million dollars a year, exclusive of military personnel

²³³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (holding that the “operations of the nation in [foreign territory] must be governed by treaties, international understandings and compacts, and the principles of international law”).

²³⁴ *See, e.g.,* Vladeck, *supra* note 35.

²³⁵ *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²³⁶ *See* JONATHAN MAHLER, *THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER* 298 (2008).

²³⁷ *See* Glazier, *supra* note 36, at 905, 915; Hum. Rts. Watch, *supra* note 36.

²³⁸ *See, e.g.,* *FACTBOX: Hamdan Verdict Divides Candidates*, REUTERS (Aug. 6, 2008), <https://www.reuters.com/article/us-guantanamo-hearings-politics/factbox-hamdan-verdict-divides-candidates-idUSN0648172820080806> [<https://perma.cc/MM3P-3HAG>].

²³⁹ Glazier, *supra* note 36, at 911–12.

²⁴⁰ *Id.*

²⁴¹ *The Guantánamo Docket*, *supra* note 15.

costs, which the parent services bear.²⁴² With only ten individuals facing charges, the commissions alone—not including detention costs—thus consume well over \$13 million *per year per defendant*. The five 9/11 defendants have already been in the system for a decade and are still mired in pre-trial proceedings. The total price tag for two decades of commission operations must now be approaching \$2 billion, for which they can show initial “convictions” for just eight defendants, six by plea agreement. The D.C. Circuit Court of Appeals has now repudiated all charges against four of them.²⁴³ It thus seems odd that anyone would seriously advocate their continued use, particularly when better options exist for any cases that may legitimately be prosecuted.

U.S. federal courts, for example, can prosecute a range of war crimes and actual terrorism offenses that involve an American victim or perpetrator, including conspiracies and providing material support to terrorism (if the conduct took place in the United States after 1996 or abroad after 2004).²⁴⁴ Although rarely, if ever, employed to date, the Uniform Code of Military Justice covers “any person who by the law of war is subject to trial by a military tribunal” within general court-martial jurisdiction.²⁴⁵ So their use is theoretically possible for conduct constituting war crimes, although subject to the concerns discussed below in subsection C.2.

Foreign courts should also have equivalent authority to that of the United States to prosecute offenses under international law, more if they adopt universal jurisdiction where that law permits. Moreover, any act of violence that an individual lacking belligerent immunity committed could be prosecuted as an ordinary crime under the law of the state where it took place. Third states may also try such a case depending on the nationality of the perpetrator or victim. The U.S. government thus may have extradition options in addition to its own ability to prosecute. At least one more credible tribunal should thus have jurisdiction over any crime that a Guantánamo military commission defendant committed.

²⁴² U.S. DEP’T OF DEF., DEF. LEGAL SERVS. AGENCY, FISCAL YEAR 2022 PRESIDENT’S BUDGET 4 (2021). The FY 2022 request was for \$130,324,000; the actual appropriation for FY 2020 was \$131,142,000, and \$106,666,000 for FY 2021, a year during which the COVID-19 pandemic largely curtailed proceedings.

²⁴³ N.Y. CITY BAR, CONVERTING GUANTÁNAMO BAY MILITARY COMMISSIONS INTO AN ARTICLE III COURT (2020).

²⁴⁴ See 18 U.S.C. § 2441 (codifying war crimes); 18 U.S.C. § 2339 (criminalizing providing material support or financing for terrorism).

²⁴⁵ 10 U.S.C. § 818.

If practical considerations are insufficient for the United States to move on finally from the Guantánamo commissions process, the legal issues assessed in this Part should compel this decision. While the commissions' legitimacy was subject to question even while the Afghan conflict continued, their post-hostilities legality is far more dubious under both international and U.S. law. This Article focuses on the impact of the end of hostilities on Guantánamo detention and trials. The author stands by previous arguments that the commissions fail to meet key domestic and international legal requirements for wartime trials, and potentially constitute the actual war crime of "denial of a fair trial."²⁴⁶ This Part considers only *additional* issues that the end of active hostilities and detention authority poses.

As discussed in Part II, a state's detention authority can end even before actual hostilities do. This situation can occur with respect to specific individuals no longer posing the requisite threat, or across the board due to a change in conflict classification, shifting detention authority from the law of war to the local state's domestic law. This Part first examines the legal impact that loss of law of war detention authority should have on wartime trials, before considering the additional ramifications that the overall end of hostilities has for the Guantánamo commissions.

It is worth reiterating that authority to prosecute serious wartime misconduct does not end with the termination of law of war-based preventive detention. The Third Geneva Convention states that even an actual POW need not be repatriated for either medical considerations or at the end of active hostilities *if* criminal proceedings are "pending" or they have been convicted of "an indictable offense" and have not completed their sentence.²⁴⁷ The ICRC's commentary explains that the treaty language was deliberately chosen. Pending means prosecution efforts must actually be underway; an individual cannot be retained to face charges yet to be brought.²⁴⁸ The use of the term "indictable offense" serves to exclude minor crimes, e.g., what

²⁴⁶ See generally Glazier, *supra* note 36 (providing a comprehensive critique of the post-MCA 2009 commission shortcomings).

²⁴⁷ Geneva III, *supra* note 61, arts. 115 (addressing POWs otherwise eligible for repatriation or transfer on medical grounds) & 119 (addressing POWs at the close of hostilities).

²⁴⁸ INT'L COMM. OF THE RED CROSS, COMMENTARY ON III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, § 4513 (Jean Pictet ed., 1960). Although the word "pending" can imply something that is going to happen in colloquial use, Black's Law Dictionary defines it as "begun, but not yet completed; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is said to be pending from its inception until the rendition of final judgment." *What Is PENDING*, BLACK'S LAW DICTIONARY FREE ONLINE LEGAL DICTIONARY (2d ed.) (cleaned up), <https://thelawdictionary.org/pending/> [https://perma.cc/6HAR-QAG8].

Americans would call a misdemeanor.²⁴⁹ But there are significant ramifications in terms of how those trials may be conducted and what legal standards are used to judge them.

A. Extradition as an Alternative to U.S. Post-Hostilities Trials

If an individual is retained for prosecution after law of war detention authority has ceased to apply, it logically follows that the governing legal regime becomes that of criminal law. This explains the requirement for prosecution efforts to be underway; there would be no legal basis to detain someone on mere suspicion, and charges must be actually pending. Unless the detaining power has actual authority to transfer charged individuals to its criminal jurisdiction and hold them under national law, the law of war requires their repatriation.²⁵⁰

There is another possibility not specifically addressed in law of war rules, however. If a third country wants a detainee for criminal prosecution, and the power holding them has the necessary legal authority to extradite to that requesting state, it could arguably overcome the default obligation to repatriate the detainee. The Third Geneva Convention language addressing retention for post-hostilities trials does not explicitly limit that authority to the detaining state.²⁵¹ So, it should not be a categorical bar to extradition should charges actually be pending.²⁵²

The Third Geneva Convention does mandate that its protections apply until a prisoner's "final release and repatriation."²⁵³ But Article 12 allows for POW transfer if the destination state is a Convention party and agrees to apply it. Articles 103 and 108 explain what that means for individuals detained to face pending charges and for those already serving a sentence, respectively. The former must be held in a POW camp or jail; they cannot be sent to an actual prison or penitentiary. The latter are to be confined in "the same establishments and under the same conditions as in the case of members of

²⁴⁹ INT'L COMM. OF THE RED CROSS, *supra* note 248, § 4511.

²⁵⁰ There would be no legal barrier to seeking their returned extradition once charges were lodged if erstwhile enemies were willing to cooperate.

²⁵¹ Geneva III, *supra* note 61, art. 119.

²⁵² This issue arose in the case of Panamanian General Manuel Noriega, who was captured during the 1989 U.S. invasion, brought to the United States, and convicted of drug offenses. The United States acknowledged his claim to POW status but extradited him to France to face criminal charges rather than repatriate him to Panama at the end of his federal sentence. *See Noriega v. Pastrana*, 564 F.3d 1290 (11th Cir. 2009).

²⁵³ Geneva III, *supra* note 61, art. 5.

the armed forces of the Detaining Power.”²⁵⁴ In either case, detainees retain the right to make complaints about their treatment, for the Protecting Power or ICRC to visit them, and to send and receive letters.²⁵⁵

A country would be on the strongest footing extraditing rather than repatriating a detainee when complying with a treaty imposing a specific obligation to prosecute or extradite (*aut dedere aut judicare*). Examples of these agreements include the 1984 Convention Against Torture and the 1997 International Convention for the Suppression of Terrorist Bombings.²⁵⁶ In these cases, there is a very strong argument that the legal principle that a law governing “a specific subject matter overrides a law that only governs general matters” (*lex specialis derogat legi generali*, or *lex specialis* for short) applies.²⁵⁷ The extradition obligation for the crime(s) addressed in the applicable treaty is arguably a more specialized rule, taking precedence over the general law of war mandate for detainee release at the end of hostilities.

Regardless of where individuals are tried after their detention transitions to post-conflict authority, additional fair trial mandates will apply.

B. Additional Legal Constraints on Post-hostilities Trials

The 1949 Geneva Conventions were ahead of their time in providing fair trial standards, while overall human rights law was still aspirational. It thus made sense that treaties covered both POWs and civilian-protected persons until their final release.²⁵⁸ This arrangement ensured that states could not gain an unfair advantage by transferring them from law of war detention to a domestic law regime outside any international legal regulation.²⁵⁹

Today, however, human rights law offers at least equivalent, and often greater, protections than the law of war. It is logically now the *lex specialis* when an individual is retained to face post-hostilities prosecution under national criminal law processes. Since Geneva rules will continue to

²⁵⁴ Geneva III, *supra* note 61, arts. 12, 103, 108. In the United States, that could be a military correctional custody facility, the United States Disciplinary Barracks at Fort Leavenworth, or a regular federal prison, depending on the time to be served.

²⁵⁵ Geneva III, *supra* note 61, arts. 78, 98, 108, 126.

²⁵⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 284.

²⁵⁷ See, e.g., *Lex Specialis*, USLegal.com, <https://definitions.uslegal.com/l/lex-specialis> [https://perma.cc/5TKJ-6XKF].

²⁵⁸ Geneva III, *supra* note 61, art. 5; Geneva IV, *supra* note 61, art. 6.

²⁵⁹ See INT'L COMM. OF THE RED CROSS, *supra* note 248, § 1105.

apply to many persons in this situation, their fair trial standards should provide floor–minimum standards that any prosecution must meet. But states should *also* have to satisfy any higher standards found in international human rights law or the domestic law applicable to the trial.

The transformation of detention authority to a criminal law-based scheme would have a substantial impact on the Guantánamo commissions. Both international law and U.S. constitutional standards imposing additional legal constraints on government conduct would apply.

1. Speedy Trial Considerations

The initial vision of military commissions providing expeditious trials has proven to be a cruel hoax. In September 2006, Bush bemoaned that families of 9/11 victims had waited five years for justice and insisted that they “should have to wait no longer.”²⁶⁰ But continued reliance on a glacial military commission process has left them still waiting—twenty years after their losses—to see an actual trial!²⁶¹

There has been less concern about any rights that defendants might have. From a practical perspective, there has been little reason to date for any defense objections to delays. When the conflict lacked any discernable endpoint, it was senseless for those facing serious charges to be in any hurry to see their trials completed. Moreover, the defense teams have had to litigate fundamental issues about the commissions’ fairness, contest prosecution efforts to admit torture-tainted evidence, and compel the production of required disclosures. The prosecution must thus bear substantial responsibility for these delays.²⁶²

²⁶⁰ Off. of the Press Sec’y, The White House, *supra* note 153.

²⁶¹ A Pacific Council report based on live Guantánamo observations over a number of years evidences a number of causes for the delays, and notes how the anticipated trial dates have continuously failed to pan out. PAC. COUNCIL ON INT’L POL’Y, UP TO SPEED 7–11 (2016) (including a quote from the *Los Angeles Times* that “[n]either side seems all that eager to go to trial”), https://www.pacificcouncil.org/sites/default/files/related_resources_files/Up%20to%20Speed%20-%20GTMO%20Task%20Force%20report%20-%20Feb%202016_0.pdf [https://perma.cc/V2WV-98B2].

²⁶² See, e.g., *Federal Government Unsuccessfully Seeks to Reinstate Rulings in al-Nashiri Military Commissions Proceeding*, A.B.A. (Dec. 1, 2019), https://qa.americanbar.org/groups/committees/death_penalty_representation/project_press/2019/year-end-2019/federal-government-unsuccessfully-seeks-to-reinstate-rulings-in/ [https://perma.cc/7A72-KMGS]; see also Guiora & Blank, *supra* note 28.

The MCA exempts the commissions from the “speedy trial” mandates for courts-martial.²⁶³ This exemption may not violate international law; while the Third Geneva Convention requires that POW “trial[s] shall take place as soon as possible,” the United States denies that Guantánamo detainees qualify for its protections. Fair trial standards in the Additional Protocols *are* more likely to apply, but neither actually mandates speedy trials.²⁶⁴

Once detention is decoupled from the law of war regime, however, timing becomes more significant. A prompt trial is now a core human right, reflected in the maxim “justice delayed is justice denied.”²⁶⁵ The United States was a global leader, enshrining the right to a “speedy and public trial” in the Sixth Amendment 230 years ago.²⁶⁶ The 1966 International Covenant on Civil and Political Rights (ICCPR) declared that anyone “detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release.”²⁶⁷ Similar language is now found in regional American, European, and African accords as well as “in the statutes of the ICC and other international criminal courts and tribunals.”²⁶⁸ Although U.S. officials argue that the ICCPR does not apply to Guantánamo based on a quirky treaty construction, the speedy trial right is now considered customary international law and should therefore apply to any trial governed by human rights law rather than the law of war.²⁶⁹ European human rights bodies were willing to find that the plodding Guantánamo commission process constituted fair trial violations even during the preventive detention era.²⁷⁰ It now becomes much more likely that U.S. courts would do the same.

²⁶³ Military Commissions Act of 2009, *supra* note 156, § 948b(d)(A).

²⁶⁴ Additional Protocol I, *supra* note 67, art. 75; Additional Protocol II, *supra* note 70, art. 6.

²⁶⁵ AMAL CLOONEY & PHILIPPA WEBB, *THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW* 389 n.1 (2021) (attributing the quote to W.E. Gladstone, British Prime Minister in the late 1800s).

²⁶⁶ U.S. CONST. amend. VI.

²⁶⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [<https://perma.cc/EJ78-SGZ7>] [hereinafter ICCPR].

²⁶⁸ CLOONEY & WEBB, *supra* note 265, at 392.

²⁶⁹ See, e.g., Judge Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, 3 BERKELEY J. INT’L L. PUBLICIST 1, 4–5 (2009) (highlighting, *inter alia*, that Art. 14 of the ICCPR is now customary international law. ¶ 3. (c) of the ICCPR provides the right “to be tried without undue delay.”); CLOONEY & WEBB, *supra* note 265, at 389–444.

²⁷⁰ CLOONEY & WEBB, *supra* note 265 at 403–07.

The Inter-American Court of Human Rights has held that a victim's relatives also have a right to press speedy trial claims.²⁷¹ That could add a new layer of litigation to a process already hopelessly bogged down and give rise to defense counter claims if proceedings were rushed to their detriment; international law gives fairness precedence over timing.²⁷² So, the ironic consequence of recognizing speedy trial rights might be to slow commission proceedings further.

It is widely agreed that speedy trials are more critical when defendants are held in pre-trial detention. International criminal tribunals are infamous for the time necessary to complete their complex trials yet still seriously consider speedy trial challenges.²⁷³ For example, the Appeals Chamber of the International Criminal Tribunal for Rwanda has even ordered the "unconditional immediate release" of an accused genocidaire because his core "rights were violated by his prolonged detention without trial."²⁷⁴

2. Pre-trial Release Considerations

Although the idea of encountering an individual charged with a serious crime enjoying a hamburger at the Guantánamo McDonald's or sunning at a community pool seems farfetched, anyone held under a criminal law regime has a right to be considered for pre-trial release. This is implied in the Constitution's prohibition against excessive bail and is explicit in the U.S. Code.²⁷⁵ It is recognized in U.S. military law where pre-trial detention is at least formally the exception.²⁷⁶ It is also mandated in human rights treaties; the ICCPR, for example, provides:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the

²⁷¹ *Id.* at 398.

²⁷² *Id.* at 426–28.

²⁷³ See Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79 (2009) (analyzing international criminal tribunal case timing); CLOONEY & WEBB, *supra* note 265, at 392 (discussing speedy trial issues at recent international tribunals).

²⁷⁴ Press Release, International Criminal Tribunal for Rwanda, Appeals Chamber Orders Release of Accused Barayagwiza, (Nov. 4, 1999), <https://unictr.irmct.org/en/news/appeals-chamber-orders-release-accused-barayagwiza> [<https://perma.cc/JX6J-QMV6>].

²⁷⁵ U.S. CONST. amend. VIII; 18 U.S.C. § 3142.

²⁷⁶ See, e.g., DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 5.9 (8th ed. 2012).

general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.²⁷⁷

Even at the ICC, established to try “the most serious crimes of international concern,” defendants have the “right to apply for interim release pending trial.”²⁷⁸ The ICC has granted several requests from individuals charged with offenses related to obstruction of justice, although not for anyone charged with serious substantive offenses to date.²⁷⁹ Commission judges may not have previously needed to consider pre-trial release requests. Now, however, such consideration is required for any post-hostilities trials.

3. Right to Consular Access

The law of war assumes the absence of diplomatic relations between international conflict parties and thus relies on neutral third states (“Protecting Powers”) and ICRC representatives to act as intermediaries between belligerent states and to monitor detainee matters.²⁸⁰ The “war on terror” is unique in that the non-state adversaries represented a broad spectrum of nationalities, and the United States has normal diplomatic relations with almost all of them. Citizens of 47 different countries have been detained at Guantánamo, including nationals of Australia, Belgium, Canada, China, Denmark, France, Russia, Spain, and the United Kingdom.²⁸¹ The thirty-seven still held in 2021 included nationals of a dozen countries plus one stateless Rohingya.²⁸²

While the United States ultimately elected to allow ICRC access to Guantánamo detainees, it has restricted state contact while showing unique favor to its closest allies, including Australia, Canada, and the United

²⁷⁷ ICCPR, *supra* note 267, art. 9, ¶ 3.

²⁷⁸ Rome Statute, *supra* note 227, arts. 1, 60, ¶ 1.

²⁷⁹ See, e.g., Press Release, International Criminal Court, ICC Pre-Trial Chamber A Grants Interim Release to Paul Gicheru, (Jan. 29, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1562> [<https://perma.cc/V4HA-GLZR>]; Diletta Marchesi & Chiara Fusari, “To Release or Not to Release, That Is the Question”: Detention Pending Trial at the International Criminal Court After the Gicheru Case, EJIL:TALK! (Mar. 8, 2021), <https://www.ejiltalk.org/to-release-or-not-to-release-that-is-the-question-detention-pending-trial-at-the-international-criminal-court-after-the-gicheru-case> [<https://perma.cc/YW5B-48MV>].

²⁸⁰ See, e.g., UK Ministry of Defence, *supra* note 42, §§ 16.11–13.1.

²⁸¹ See *The Guantánamo Docket*, *supra* note 15.

²⁸² *Id.*

Kingdom.²⁸³ The Inter-American Commission on Human Rights reports that at least one Saudi detainee has been denied communication with his government, which both Saudi Arabia and the detainee want.²⁸⁴

The right of a state to protect its nationals is a fundamental principle of international law. The Vienna Convention on Consular Relations recognizes the *right* of consular officials “to visit a national . . . in prison, custody or detention . . . and to arrange for his legal representation.”²⁸⁵ It goes on to recognize a consular right to visit nationals “in prison, custody or detention *in their district* in pursuance of a judgment.”²⁸⁶ But there is no geographic restriction concerning pre-trial access. Therefore, a strong argument exists for mandatory foreign state access to their nationals facing post-hostilities trials, even if they take place at Guantánamo.

4. Credit for Time Spent in Pre-trial Detention

The unique nature of the Guantánamo military commissions leaves both lawyers and judges grappling with what rules should apply. One area of particular uncertainty is time spent in pre-trial detention. The first commission case, David Hick’s plea deal, saw a sentence of seven years with six years and three months “suspended,” but no credit for time served despite prolonged isolated confinement.²⁸⁷ In the first contested trial, that of Salim Hamdan, the judge decided that his initial two years constituted law of war detention, but gave him credit for the subsequent sixty-one months of confinement after being charged.²⁸⁸ The panel then sentenced him to a total of sixty-six months, leaving just five months to serve. The judge, however,

²⁸³ See, e.g., LEIGH SALES, *DETAINEE 002: THE CASE OF DAVID HICKS* (2007) (describing Australian government access to its national); *Timeline: Guantánamo Bay Britons*, BBC (Jan. 27, 2005), http://news.bbc.co.uk/2/hi/uk_news/3545709.stm [<https://perma.cc/DJ9S-Z28S>]. State access has not always been in the detainee’s actual interests. Ian Austen, *Canada Apologizes and Pays Millions to Citizen Held at Guantánamo Bay*, N.Y. TIMES (Jul. 7, 2017), <https://www.nytimes.com/2017/07/07/world/canada/omar-khadr-apology-guantanamo-bay.html> [<https://perma.cc/79AP-HCXU>].

²⁸⁴ INTER-AM. COMM’N ON HUM. RTS., *TOWARDS THE CLOSURE OF GUANTANAMO* 102 (2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf> [<https://perma.cc/82EH-YSSG>].

²⁸⁵ Vienna Convention on Consular Relations art. 36(1)(c), Apr. 24, 1963, 596 U.N.T.S. 261 (emphasis added).

²⁸⁶ *Id.*

²⁸⁷ See SALES, *supra* note 283, at 152–54 (discussing detention conditions), 275 (reprinting plea agreement including provision that all pre-trial time was under the law of armed conflict and not criminal detention).

²⁸⁸ BRAVIN, *supra* note 16, at 340–41.

conceded that he did not know if Hamdan would actually be released at the end of his sentence or returned to preventive detention.²⁸⁹

The MCA is silent on this issue, but the amplifying Manual for Military Commissions has barred credit for time served since at least 2010.²⁹⁰ Both the Third and Fourth Geneva Conventions mandate credit for any time spent actually confined, as compared to being held in communal camp living, before trial. The 2019 Manual at least allows the defense to raise “the nature and length of pretrial detention as a matter in mitigation.”²⁹¹ This provision is helpful given the horrendous treatment that many Guantánamo detainees—particularly those that the CIA held—receive before ever being charged.²⁹² One commission judge decided that they can award sentence credit for detainee maltreatment *per se*.²⁹³

Domestic and international law should *mandate* that post-conflict trials give credit for pre-trial detention.²⁹⁴ Time spent in actual preventive law of war detention need not be credited under a literal reading of most applicable law. But Guantánamo was effectively a prison rather than a

²⁸⁹ *Id.* at 342–43. To the government’s credit, Hamdan was subsequently repatriated to Yemen in time to serve the final month of his sentence there. Carol J. Williams, *Bin Laden’s Driver Is Going Home*, L.A. TIMES (Nov. 25, 2008), <https://www.latimes.com/archives/la-xpm-2008-nov-25-na-hamdan25-story.html> [<https://perma.cc/L6BY-K3CT>]. On the other side of the coin, in an opinion that then-Judge Brett Kavanaugh wrote, a Republican-appointed three judge panel of the D.C. Circuit Court of Appeals subsequently invalidated the sole charge that he was convicted on: providing material support to terrorism. BRAVIN, *supra* note 16, at 377–80. He should then not have served *any* time.

²⁹⁰ See Stevie Moreno Haire, Comment, *No Way Out: The Current Military Commissions Mess at Guantanamo*, 50 SETON HALL L. REV. 855, 859 (2020) (quoting 2010 Manual for Military Commissions but incorrectly identifying it as a congressional enactment).

²⁹¹ See U.S. DEP’T OF DEF., MANUAL FOR MILITARY COMMISSIONS II–131 (2019), <https://www.mc.mil/Portals/0/pdfs/Manual%20for%20Military%20Commissions%202019%20Edition.pdf> [<https://perma.cc/B4YW-C9YH>].

²⁹² See, e.g., Carol Rosenberg, *What the C.I.A.’s Torture Program Looked Like to the Tortured*, N.Y. TIMES (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/us/politics/cia-torture-drawings.html> [<https://perma.cc/8ZPP-G7J3>].

²⁹³ See Carol Rosenberg & Julian E. Barnes, *Guantánamo Detainee Agrees to Drop Call for C.I.A. Testimony*, N.Y. TIMES (May 14, 2021), <https://www.nytimes.com/2021/05/14/us/politics/guantanamo-detainee-cia-testimony.html> [<https://perma.cc/L2CX-5BP8>]. The detainee who received this ruling, Majid Khan, agreed to have it vacated in exchange for a plea deal. See John Ryan, *Guantanamo Detainee Majid Khan Poised for Sentencing and Release After July Hearing*, LAWDRAGON (Aug. 4, 2021), <https://www.lawdragon.com/news-features/2021-08-04-guantanamo-detainee-khan-poised-for-sentencing-and-release-after-july-hearing> [<https://perma.cc/5Z74-S AQU>].

²⁹⁴ *E.g.*, 18 U.S.C. § 3585 (“A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences [as a result of pending charges]”); Rome Statute, *supra* note 227, art. 78, ¶ 2.

“camp” for all detainees initially, and for the “non-compliant” after that.²⁹⁵ Courts should therefore give sentence credit for *any* time a detainee was held in an individual cell, and all time in CIA custody, rather than just the time after charges were lodged. Additional credit is logically appropriate as mitigation for documented abuse as well.

5. Mandatory Release upon Acquittal or Sentence Completion

The fact that Hamdan’s judge was unsure if he would be released reflects the fact that international law treats preventive detention and criminal punishment as separate matters. Since the government resolved most cases via plea bargains, delivering on repatriation promises was essential to motivate other detainees to accept deals. It is perfectly lawful for a POW or civilian internee to be subjected to disciplinary or judicially imposed confinement for specific wrongdoing and then returned to a communal preventive detention camp if active hostilities are ongoing and the individual remains a credible threat. But the end of hostilities obviously now mandates prompt release upon an acquittal or dismissal of charges, and at the end of any criminal sentence.

6. Equality Before the Law

The Guantánamo commissions’ role in dispensing a lower standard of justice suitable only for foreigners should be a fatal defect in the post-hostilities era. Despite making some improvements to the two MCAs, Congress has still limited their jurisdiction to “alien unprivileged enemy belligerent[s].”²⁹⁶ This limitation implies that their “rough justice” is too substandard for either Americans or ordinary criminals.

This approach is ahistorical; General Winfield Scott created the military commission in 1846 in order to gain jurisdiction over American military offenders in Mexico for common crimes outside the court-martial’s statutory jurisdiction.²⁹⁷ All prior iterations could try Americans, and the Supreme Court specifically upheld both their law of war and military

²⁹⁵ Associated Press, *Guantánamo Detainees Are Given Chance to Garden*, BOSTON GLOBE (Mar. 12, 2007), http://archive.boston.com/news/nation/articles/2007/03/12/guantanamo_detainees_are_give_n_chance_to_garden/ [<https://perma.cc/BK7P-DXNR>] (reporting just 35 out of 385 detainees were living in communal camp conditions).

²⁹⁶ 10 U.S.C. § 948c.

²⁹⁷ Glazier, *supra* note 129, at 2027–32.

government jurisdiction over U.S. citizens in World War II-era decisions.²⁹⁸ For wartime trials, the commissions' restrictions to non-citizens would be an immediate showstopper if the defendants were POWs since the Third Geneva Convention explicitly limits their trial to "the same courts according to the same procedure" used to try the state's own personnel.²⁹⁹

International human rights law, however, calls many commission aspects, including particularly disparate treatment based on nationality, into serious question. The principle of equality before the law dates back at least to the Magna Carta in England (1215) and the Treaty of Arbroath in Scotland in 1320.³⁰⁰ The first modern human rights document is the May 1948 American Declaration of the Rights and Duties of Man, predating the better known Universal Declaration of Human Rights by seven months.³⁰¹ In its resolution adopting the Declaration, the Ninth International Conference of American States noted that "[we] have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality[.]"³⁰² The Declaration's preamble begins, "All men are born free and equal," while Article II declares that "[a]ll persons are equal before the law."³⁰³ Although disputed by the U.S. government,

According to the well-established and long-standing jurisprudence and practice of the inter-American system . . . the American Declaration is recognized as constituting a source of legal obligation for [Organization of American States (OAS)] member states, including in particular those States that are not parties to the American Convention on Human Rights. These obligations are considered to flow from the human rights obligations of Member States under the OAS Charter.³⁰⁴

The United States is an OAS member state that has not ratified the American Convention. The Inter-American Commission on Human Rights

²⁹⁸ *Ex parte Quirin*, 317 U.S. 1 (1942) (upholding law of war jurisdiction over a U.S. citizen); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (upholding military government court jurisdiction over a U.S. civilian for murdering her husband in occupied Germany).

²⁹⁹ Geneva III, *supra* note 61, art. 102.

³⁰⁰ *Robinson*, *supra* note 269, at 2.

³⁰¹ *See id.* at 4.

³⁰² American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./ V./II.23, doc. 21 rev. 6 (1948).

³⁰³ *Id.* preamble, art. 2.

³⁰⁴ INTER-AM. COMM'N ON HUM. RTS., *supra* note 284, ¶ 18.

has used the above interpretation to call out the United States for its disparate treatment of Guantánamo detainees, including the use of discriminatory military commissions, as Declaration violations.³⁰⁵

The Universal Declaration on Human Rights also incorporated this concept of equality.³⁰⁶ It is now codified in the legally binding ICCPR, which proclaims, “[a]ll persons shall be equal before the courts and tribunals.”³⁰⁷

Experts debate the applicability of human rights law to armed conflict; most seem to agree that it should at least apply where there are gaps in specific law of war rule coverage. Those questions should now be moot with respect to Guantánamo, however, as the end of active hostilities in Afghanistan leaves no relevant conflict for law of war rules to apply. At most, it leaves room only for the residual post-conflict application of the Third and Fourth Geneva Convention provisions previously discussed, *if* they applied to the Guantánamo detainees, an idea which the government denies.³⁰⁸ International human rights law thus logically now constitutes the *lex specialis* by which the legality of any detention and trials should be judged. And by that law, the commissions’ unequal application only to non-citizens should be fatal to their legitimacy.

C. *Constitutional Considerations and Post-war Criminal Trials*

The Constitution provides only two vehicles for criminal trials. Article III establishes federal courts, explicitly providing for jury trials of crimes.³⁰⁹ Article I allows Congress to “make Rules for the Government . . . of the land and naval Forces,”³¹⁰ implicitly authorizing courts-martial given their Revolutionary War use. Although the Continental Congress largely copied the proven British Articles of War, a 1776 enactment expanded U.S. court-martial jurisdiction beyond the British analog to include foreigners “lurking as spies.”³¹¹ Congress copied the Revolutionary War language into

³⁰⁵ *Id.* ¶¶ 213–250.

³⁰⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 7, 10 (Dec. 10, 1948). Article 7 declares, “All are equal before the law and are entitled without any discrimination to equal protection of the law,” while Article 10 proclaims, “Everyone is entitled in full equality to a fair and public hearing . . . of any criminal charge against him.”

³⁰⁷ ICCPR, *supra* note 267, art. 14, ¶ 1.

³⁰⁸ *See, e.g.,* Bush, *supra* note 105.

³⁰⁹ U.S. CONST. art. III, § 1, § 2, cl. 3.

³¹⁰ *Id.* art. I, § 8, cl. 14.

³¹¹ Resolution of the Continental Congress (Aug. 21, 1776), in 5 JOURNALS OF THE AMERICAN CONGRESS 1774–1779 693 (Worthington Chauncey Ford ed., 1906).

the Articles of War (and ultimately the Uniform Code of Military Justice) reenacted under the Constitution, so this use is presumably “grandfathered.”³¹² Spying under the Uniform Code of Military Justice (UCMJ) is a unique wartime offense wholly distinct from the federal crime of espionage. The perpetrator must be caught in the act; successfully rejoining her own forces confers immunity.³¹³

On the other hand, military commissions were only created during the 1846 Mexican War; they are thus “exceptional” tribunals outside the scope of normal constitutional criminal trial authority.³¹⁴ They were invented as jurisdictional gap-fillers, allowing commanders to try crimes, and in some cases perpetrators, outside the statutory jurisdiction of any regular tribunal.³¹⁵ Determining their underlying constitutional authority is complicated by the fact that they have been used in three distinct roles: (1) as judicial authorities for wartime governments occupying foreign countries; (2) as law of war tribunals; and (3) as martial law courts in domestic territory.³¹⁶

Guantánamo is leased from Cuba and not under wartime occupation, so that rules out the first use. Additionally, it is not under martial law, and in any event *Ex parte Milligan* held that the Constitution prohibited this use when U.S. civil courts were open.³¹⁷ The legitimacy of the Guantánamo trials thus depends on their qualifying as law of war tribunals, a role that key Supreme Court decisions discussed below considered. This Section will sequentially examine the legitimacy of using law of war military commissions, courts-martial, and regular federal courts for post-hostilities trials of individuals currently held at Guantánamo.

³¹² Cf. David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 20–23 (2005) (providing history of court-martial authority to try spies).

³¹³ See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 241–45 (2010). Espionage offenses are found with general federal crimes in Chapter 37 of U.S. Code Title 18; 18 U.S.C. §§ 792–99. Spying, as the concept is defined by the law of war, is addressed in UCMJ punitive article 103, 10 U.S.C. § 903, which applies to “[a]ny person,” not just those ordinarily subject to U.S. military law. Its application is explicitly limited to “time of war.”

³¹⁴ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 590–91 (2006).

³¹⁵ See Glazier, *supra* note 129, at 2010.

³¹⁶ See David Glazier, *The Misuse of History: Conspiracy and the Guantánamo Military Commissions*, 66 BAYLOR L. REV. 295, 300–301 (2014).

³¹⁷ *Ex parte Milligan* 71 U.S. (4 Wall.) 2, 121–22 (1866).

1. Post-hostility Use of Military Commissions to Try Guantánamo Detainees

Several World War II-era cases have precedentially established the power of military commissions to try law of war violations. The first stemmed from the June 1942 landing of eight Nazi saboteurs on the U.S. East Coast. Coming before American victory was assured, news of the arrests provoked public outrage.³¹⁸ Although federal courts were open, there was no law under which the saboteurs could be charged that could result in more than a few years in prison.³¹⁹ President Roosevelt wanted death sentences, and so Attorney General Francis Biddle—despite his reputation as a civil libertarian—proposed trial by a military commission making its own procedural rules.³²⁰ As Vice President Cheney would later do with President Bush, Attorney General Biddle communicated directly with President Roosevelt, getting him to sign a military order convening the commission and purportedly barring judicial review.³²¹

Despite (or perhaps because of) the effort to deny its authority, the Supreme Court assembled during its summer recess just to hear this case, a habeas petition by one of the saboteurs, Richard Quirin. It upheld the commission as an “important incident to the conduct of war” that the military command (i.e., the President) was empowered to dictate and as an action that Congress duly authorized pursuant to its war powers, authority over military law, and the Define and Punish Clause.³²² Furthermore, the Court held that the commission’s validity required that a recognized law of war violation be charged, and it dedicated several pages to demonstrating that the saboteurs’ conduct qualified.³²³ *Quirin* also held that the commission could try U.S. citizens, since association with the enemy made them belligerents subject to the law of war.³²⁴ The decision therefore did not discriminate based on nationality.

The approval of a commission trial that involved judicial shortcuts has not fared well historically. Justice Scalia observed that *Quirin* “was not

³¹⁸ MICHAEL DOBBS, *SABOTEURS: THE NAZI RAID ON AMERICA* 221–24 (2004).

³¹⁹ *Id.* at 200.

³²⁰ *Id.* at 199–200.

³²¹ *Id.* at 203–05.

³²² *See Ex parte Quirin*, 317 U.S. 1, 10–11 (1942).

³²³ *See id.* at 12–15.

³²⁴ *See id.* at 15–16.

this Court’s finest hour.”³²⁵ But, by confirming judicial authority in defiance of the presidential order, the decision laid the essential foundation for post-9/11 consideration of commissions in *Hamdi* and *Hamdan*.

The 1945 U.S. trial of the last Japanese commander in the Philippines, General Tomoyuki Yamashita, was also highly controversial.³²⁶ Japanese forces committed horrific atrocities in the final months of the war, and Yamashita was condemned to hang after Japan’s surrender for having failed to suppress them.³²⁷ Although upholding the verdict, the Court again confirmed clear limits on military commission use, holding that the trial was only authorized if “the charge preferred against him is of a violation of the law of war.”³²⁸ Together with *Quirin*, the decision suggests that the Define and Punish Clause is limited by the actual content of international law. *Yamashita* held that only a “field commander, or by any commander competent to appoint a general court-martial,” could appoint a law of war commission, casting doubt on Guantánamo’s civilian appointing authorities.³²⁹ The most significant new holding responded to defense challenges to conducting a law of war trial after the Japanese surrender.³³⁰ The Court agreed that law of war tribunals were limited to wartime, but—consistent with the international law of that day—held that a state of war existed from “its declaration until peace is proclaimed.”³³¹ This made eminent sense when POWs could be detained until formal conclusion of a peace agreement. It would be perverse if the U.S. military could detain a war criminal in a camp but could not prosecute them and send them to a prison. But today, *Yamashita*’s limit of jurisdiction to time of war should equate to that authority ending with the close of active hostilities, just like detention authority.

The *Hamdan* Court confirmed that the military commission is not a penal tribunal that the Constitution contemplated and can be supported only—if at all—based on “powers granted jointly to the President and Congress *in time of war*.”³³² It surely offends the Constitution to allow exceptional military courts to conduct trials when human rights and regular

³²⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (Scalia, J., dissenting).

³²⁶ See generally ALLAN A. RYAN, *YAMASHITA’S GHOST: WAR CRIMES, MACARTHUR’S JUSTICE, AND COMMAND ACCOUNTABILITY* (2012); *In re Yamashita*, 327 U.S. 1 (1946).

³²⁷ See U.K. MINISTRY OF DEFENCE, *supra* note 42, ¶¶ 16.36–36.6.

³²⁸ *Yamashita*, 327 U.S. at 13–18.

³²⁹ *Id.* at 10; see also Glazier *supra* note 35, at 925–28.

³³⁰ *Yamashita*, 327 U.S. at 6.

³³¹ *Id.* at 12.

³³² *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006) (emphasis added).

domestic law are fully applicable, and federal criminal law now provides fully adequate, indeed legally superior, authority to do what is needed.

2. Courts-martial as a Potential Forum for Guantánamo Detainees

In 1913, Congress moved beyond just spies and adopted language that Army Judge Advocate General Enoch Crowder drafted, placing “any other person who by statute or the law of war is subject to trial by military tribunal” within the jurisdiction of a general court-martial.³³³ That language has carried over into the current UCMJ, so it could remain an option today. It has rarely been used, however, and the wording does not specify whether it is limited to wartime. But since the law of war can only authorize military trials while it is applicable (i.e., during wartime), and the impetus for the language was its author’s Philippine Insurrection experience, a wartime limitation is surely implied.³³⁴

Given U.S. courts-martial’s authority to try war crimes, and the Third Geneva Convention’s mandate for POW trials “by the same courts” as the country’s own troops,³³⁵ they initially seemed to be a viable commission alternative. Their selection after 9/11 might have headed off most subsequent criticism. It would have been hard for Americans to argue that “terrorists” deserved more due process than our own military personnel. Moreover, their implicit Geneva Convention endorsement would similarly have chilled international criticism. Before we knew who would be facing trial, many commentators, including this author, advocated their use, or the use of military commissions fully compliant with court-martial procedures, rather than allowing the judicial shortcuts that the administration favored.³³⁶

There would now be two significant issues with their post-conflict employment *if* the UCMJ were read to permit such use. The first and most damning is that most charges levied against Guantánamo defendants have not reflected actual war crimes. Some charges, like “conspiracy,” are ordinary

³³³ See Glazier, *supra* note 312, at 55–58.

³³⁴ See *id.* at 55–60 (detailing the history of the statutory language).

³³⁵ Geneva III, *supra* note 61, art. 102.

³³⁶ See, e.g., Tom Malinowski, *Court-Martial Code Offers a Fair Way to Try Terrorist Suspects*, N.Y. TIMES (Dec. 29, 2001), <https://www.nytimes.com/2001/12/29/opinion/IHT-court-martial-code-offers-a-fair-way-to-try-terrorist-suspects.html> [<https://perma.cc/77VP-NP2G>]; Glazier, *supra* note 129, at 2092–93.

federal crimes but have never been recognized as law of war violations.³³⁷ Other conduct, like the 2000 USS Cole bombing, took place outside the legitimate scope of any armed conflict.³³⁸ These circumstances would be fatal defects for law of war-based courts-martial. They should be fatal for military commissions too; but that decision will likely take years of litigation to resolve, given their glacial progress and the general reluctance of U.S. courts to intervene in commission trials. The government can at least argue that it has flexibility in the commissions given MCA language purporting to allow prosecution of both law of war violations “and other offenses triable by military commission.”³³⁹ There is no comparable UCMJ language that could rationalize court-martial jurisdiction in similar cases, however.

The second issue with using courts-martial is that U.S. courts-martial do not satisfy modern judicial standards under human rights law, a controlling form of *lex specialis* that would apply to an evaluation of their legitimacy. U.S. courts-martial retain elements of direct command involvement largely unchanged from the original British model that the Founders copied in 1776.³⁴⁰ The United Kingdom was forced to revamp substantially its military justice procedures by the European Court of Human Rights due to their failure to meet contemporary human rights standards.³⁴¹ And the other primary heirs of British law, Australia and Canada, had similar experiences. Australia’s legislature recognized the need for modernization and unilaterally made improvement. Nevertheless, Australian courts subsequently determined that even the improved version fell short of contemporary legal standards and mandated further enhancements.³⁴² Canadian courts-martial were also deemed inadequate by the Supreme Court of Canada, applying language from that country’s Charter of Rights and Freedom, which was in

³³⁷ See Charlie Savage, *Guantánamo Detainee’s Conspiracy Conviction Upheld, but Legal Issue Lingers*, N.Y. TIMES (Oct. 20, 2016), <https://www.nytimes.com/2016/10/21/us/guantanamo-detainees-conspiracy-conviction-upheld-but-legal-issue-lingers.html> [<https://perma.cc/P3F6-TNLE>].

³³⁸ See Press Release, Christopher Plummer, Hum. Rts. First, Retired Military Leaders Submit Brief in al-Nashiri Supreme Court Case (June 1, 2017), <https://www.humanrightsfirst.org/press-release/retired-military-leaders-submit-brief-al-nashiri-supreme-court-case> [<https://perma.cc/R98K-BDKQ>].

³³⁹ 10 U.S.C. § 948b (emphasis added).

³⁴⁰ See Charles J. Dunlap, Jr., *Military Justice*, in AMERICAN GOVERNANCE 269-270 (Stephen Schechter et al. eds., 2016) available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6266&context=faculty_scholarship (identifying the British origins of U.S. military law and noting that “questions continue about the appropriate role of the military commander”) [<https://perma.cc/VUJ8-8GWM>].

³⁴¹ See *Findlay v. The United Kingdom*, App. No. 2210/93, 24 Eur. H.R. Rep. 221 (1997).

³⁴² See generally Alison Duxbury, *The Curious Case of the Australian Military Court*, 10 OXFORD U. COMMONWEALTH L.J. 155 (2010).

turn based on the language of the ICCPR.³⁴³ Therefore, reasonable outside observers would have real cause to question the legitimacy of court-martial use for trying any foreign conduct outside of a period of actual hostilities.

If the United States now used courts-martial for post-hostilities trials of high-profile Guantánamo defendants, the resulting international public scrutiny would undoubtedly result in widespread criticism of American military justice. This situation would likely have significant second order effects with respect to Status of Forces Agreement (SOFA) compliance wherever American personnel are based. An American service person committing an offense subject to U.S. jurisdiction could likely invoke the host nation's human rights obligations as a bar to their surrender to military custody. And countries might even refuse to permit the U.S. military to conduct courts-martial on their territory entirely. Aside from the negative publicity this situation would generate, it could adversely impact good order and discipline among U.S. personnel—a high cost to pay for a few Guantánamo prosecutions.

3. Federal Court Jurisdiction over Guantánamo Detainees

Congress codified a number of law of war violations as federal crimes in the War Crimes Act of 1996.³⁴⁴ But the difficulties that Guantánamo prosecutors are facing contorting law of war rules to justify military trials highlight the fact that federal terrorism offenses are actually much better suited for prosecuting detainees. Federal law now includes fifty-seven different “crimes of terrorism.”³⁴⁵ The widely used charge of providing material support to terrorism, 18 U.S.C. § 2339B, cannot be used against most Guantánamo detainees because the extraterritorial reach provision was only added after the detainees were already in U.S. custody. Nonetheless, the overall body of terrorism crimes is well-suited for criminally prosecuting those individuals.³⁴⁶

³⁴³ See *R. v. Généreux*, [1992] 1 S.C.R. 259.

³⁴⁴ 18 U.S.C. § 2441.

³⁴⁵ See Eric Halliday & Rachael Hanna, *How the Federal Government Investigates and Prosecutes Domestic Terrorism*, LAWFARE (Feb. 16, 2021), <https://www.lawfareblog.com/how-federal-government-investigates-and-prosecutes-domestic-terrorism> [<https://perma.cc/JT9R-C4N3>].

³⁴⁶ See Robert Chesney, *What Title 18 Charges Could Have Been Brought Against al-Nashiri?*, LAWFARE (Apr. 21, 2011), <https://www.lawfareblog.com/what-title-18-charges-could-have-been-brought-against-al-nashiri> [<https://perma.cc/Y5NC-K4CR>].

Federal courts are not a panacea; they have not been immune from pressures to return convictions and harsh sentences for comparatively minor crimes.³⁴⁷ However, that predilection should actually be a reason for those who are more concerned about security than true justice to favor their use. The basic procedural safeguards provided by Article III courts should comply with international human rights standards as well as any residual application of law of war rules. Unlike the problematic military commissions and untried courts-martial, Article III courts have a successful track record in conducting terrorism prosecutions—at least 660 since 9/11, including:

Osama bin Laden’s son-in-law and al Qaeda spokesman Sulaiman Abu Ghaith, who was convicted of multiple terrorism offenses and sentenced to life imprisonment; Ahmed Khalfan Ghailani, an al Qaeda operative who was convicted for his role in the 1998 bombings of the U.S. embassies in East Africa and sentenced to life imprisonment; Ibrahim Suleiman Adnan Adam Harun, an al Qaeda operative who was convicted for his participation in attacks on U.S. and Coalition troops in Afghanistan and for conspiring to bomb the U.S. Embassy in Nigeria; Ahmed Abdulkadir Warsame, an al Shabaab operative who pleaded guilty to multiple terrorism offenses; and Saddiq Al-Abbadi and Ali Alvi Al-Hamidi, al Qaeda members who engaged in attacks against U.S. military forces in Afghanistan.³⁴⁸

Ghailani’s prosecution is particularly relevant as he was held in CIA custody, subjected to “enhanced interrogation techniques,” and held at Guantánamo before being sent to the United States for trial. Despite these complications, it took just nineteen months from his initial appearance in federal court until he was convicted and sentenced to a life term he is now serving in the “unescapable” supermax prison in Florence, Colorado.³⁴⁹

³⁴⁷ See generally WADIE E. SAID, *CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS* (2015).

³⁴⁸ N.Y. CITY BAR, *supra* note 243, at 3–4.

³⁴⁹ See *Ghailani v. United States*, 733 F.3d 29, 38–41 (2d Cir. 2013); Alfred E. Neuman, *Famous Prisoners at ADX Florence Facility*, RANKER (Feb. 22, 2021), <https://www.ranker.com/list/famous-prisoners-at-adx-florence-facility/treadlightly> [<https://perma.cc/4AAF-ATV5>].

IV. DISPOSITION RECOMMENDATIONS FOR REMAINING DETAINEES

The end of active hostilities requires the prompt “repatriation” of those remaining in preventive Guantánamo detention, except for those (1) serving a post-conviction sentence; (2) facing U.S. charges; or (3) being held for extradition to a third state.³⁵⁰ The thirty-seven individuals still held fall into one of four categories:

- (1) Currently facing military commission charges (10 detainees);
- (2) Previously “convicted” by a military commission (2 detainees);
- (3) Held in law of war detention but recommended for transfer “if security conditions met” (18 detainees);
- (4) Held in law of war detention and not recommended for transfer (7 detainees).³⁵¹

This Part sequentially examines each category, offering disposition recommendations for the associated detainees. The names are based on *The New York Times* “Guantánamo Docket,” an online resource listing every individual known to have been held in Guantánamo since January 2002.³⁵²

A. *Detainees Currently Facing Military Commission Charges*

As a result of an arraignment held on August 31, 2021 (coincidentally the day *after* the final U.S. withdrawal from Afghanistan), ten detainees are now facing commissions in four separate pre-trial phase proceedings.³⁵³ The most prominent case is that of accused 9/11 planner Khalid Shaikh Mohammed and four co-conspirators. The second most visible is alleged USS Cole bombing “mastermind” Abd al-Rahim al-Nashiri. A third, more obscure, case involves Abd al Hadi al-Iraqi, a resistance leader who opposed the allied intervention in Afghanistan. The most recent commission developments saw Indonesian detainee Encep Nurjaman and two Malaysian co-defendants arraigned on charges related to the October 2002 Bali

³⁵⁰ See parts I.C. and III.A. *supra*.

³⁵¹ See *The Guantánamo Docket*, *supra* note 15.

³⁵² See *id.*

³⁵³ See Hum. Rts. Watch, *supra* note 36; Carol Rosenberg, *Three Guantánamo Detainees Charged in 2002 Bali Bombing*, N.Y. TIMES (Aug. 31, 2021), <https://www.nytimes.com/2021/08/31/us/politics/guantanamo-bali-bombing.html> [https://perma.cc/FDD7-8DBD].

nightclub bombings and later attack on a Marriott hotel in Jakarta.³⁵⁴ While less familiar to Americans, the Bali bombing is widely remembered around the world, particularly in Australia, Indonesia, and the United Kingdom.³⁵⁵

The commission process has been fraught with problems since its inception, unable to deliver timely or credible justice, and extremely expensive, undermining its legitimacy and globally damaging U.S. credibility. Additionally, the fact that every individual now facing commission charges has previously been held in CIA custody, coupled with the censorship of trial proceedings, fuels perceptions that they are part of an ongoing torture coverup.³⁵⁶ Closing the Office of Military Commissions and seeking other prosecution venues would serve the best interests of the government, and certainly those who have already waited two decades to see justice for the USS Cole, 9/11, and Bali attacks.

1. Khalid Shaikh Mohammed and Alleged 9/11 Conspirators

This case has the most clear-cut prosecution alternative of any of the pending cases. The defendants have been indicted in the Southern District of New York (SDNY)—a federal jurisdiction with an impressive record of complex terrorism prosecutions dating back to the first World Trade Center bombing in 1993.³⁵⁷ The district physically encompasses the epicenter of the 9/11 attack. The Obama Administration slated the defendants for trial there before bowing to political pressures and returning the case to the fitfully plodding commissions.³⁵⁸ NBC journalist Ken Dilanian has recently detailed

³⁵⁴ See Hum. Rts. Watch, *supra* note 36; Carol Rosenberg, *Three Guantánamo Detainees Charged in 2002 Bali Bombing*, N.Y. TIMES (Aug. 31, 2021), <https://www.nytimes.com/2021/08/31/us/politics/guantanamo-bali-bombing.html> [<https://perma.cc/FDD7-8DBD>].

³⁵⁵ See, e.g., Luh de Suriyani, *Prayers, Candles to Remember Bali Bomb Victims*, REUTERS (Oct. 12, 2008), <https://www.reuters.com/article/us-indonesia-commemoration/prayers-candles-to-remember-bali-bomb-victims-idUSTRE49B0VR20081012> [<https://perma.cc/4YYM-5W4Z>].

³⁵⁶ *The Guantánamo Docket*, *supra* note 15, identifies all detainees previously held in CIA custody with an asterisk. See, e.g., Dror Ladin, *There's So Much We Still Don't Know About the CIA's Torture Program. Here's How the Government Is Keeping the Full Story a Secret*, TIME (Feb. 7, 2020), <https://time.com/5779579/cia-torture-secrecy/> [<https://perma.cc/UY5L-PPRS>] (discussing the use of commissions to cover up CIA malfeasance).

³⁵⁷ See Press Release, U.S. Dep't of Just., *Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System* (June 9, 2009), <https://archives.fbi.gov/archives/news/pressrel/press-releases/fact-sheet-prosecuting-and-detaining-terror-suspects-in-the-u.s.-criminal-justice-system> [<https://perma.cc/4G2G-MZ2K>].

³⁵⁸ See BRAVIN, *supra* note 16.

this commission's shortcomings, noting that its *forty-second* preliminary hearing was held in Guantánamo on September 7, 2021 with no trial in sight; one expert warned that it might still be a decade away.³⁵⁹

Characterizing 9/11 as an armed attack and trying the case before a law of war tribunal significantly complicates the legal issues beyond the obvious challenges of using untested procedures. The U.S. Department of Defense Law of War Manual claims “economic support” may be legally attacked, opening the door to defense arguments that the World Trade Center was a lawful target.³⁶⁰ In addition, since both airlines whose planes were hijacked are part of the Civil Reserve Air Fleet—and supported the August 2021 withdrawal from Afghanistan—there is an even stronger argument that they were legal targets.³⁶¹ Furthermore, there is no doubt that the Pentagon, one of the targets for the attacks, was an actual military object and therefore a legitimate target under the laws of war. As painful as this will be for victims to hear, the defense will probably argue that the civilian lives lost on 9/11 were “collateral damage,” not murders.³⁶² A former commission official estimates that the complexity of these issues, coupled with as-yet untested aspects of the commission process, will result in ten to fifteen years of appellate litigation at a potential cost of \$1.5 billion, if the 9/11 trial results in guilty verdicts.³⁶³

³⁵⁹ Ken Dilanian, *20 Years After 9/11, Mastermind Khalid Sheikh Mohammed Still Awaits Trial. What Went Wrong?* NBC NEWS (Sept. 7, 2021), <https://www.nbcnews.com/politics/national-security/20-years-after-9-11-mastermind-khalid-sheikh-mohammed-still-n1278592> [<https://perma.cc/LH4D-D5GM>].

³⁶⁰ See Glazier, *supra* note 35, at 961–62.

³⁶¹ See Press Release, U.S. Dep’t of Def., *Department of Defense Activates Civil Reserve Air Fleet to Assist with Afghanistan Efforts* (Aug. 22, 2021), <https://www.defense.gov/Newsroom/Releases/Release/Article/2741564/department-of-defense-activates-civil-reserve-air-fleet-to-assist-with-afghanis/> [<https://perma.cc/RVD4-VGS4>].

³⁶² The U.S. Department of Defense defines “collateral damage” as “unintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time.” U.S. DEP’T OF DEF., *DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 36 (2021), <https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf> [<https://perma.cc/D2MS-MNRE>].

³⁶³ Sacha Pfeiffer, *Guantánamo Has Cost Billions; Whistleblower Alleges “Gross” Waste*, NPR (Sept. 11, 2019), <https://www.npr.org/2019/09/11/759523615/guant-namo-court-and-prison-have-cost-billions-whistleblower-alleges-gross-waste> [<https://perma.cc/WLJ8-L3G9>].

These arguments are entirely irrelevant if the defendants are charged with regular terrorism crimes. Since federal charges are “pending,” there are no international legal barriers to transferring these defendants to U.S. Department of Justice (DOJ) custody and proceeding with a regular criminal trial. There is, however, a potential U.S. domestic law obstacle in the form of annual National Defense Authorization Act prohibitions against detainee transfers to the United States.³⁶⁴

There are two potential solutions. First, Congress can repeal or amend that prohibition and authorize transfers to the U.S. mainland for trial; there may now be some congressional openness to doing this.³⁶⁵ A more expensive, but perhaps politically easier, approach would be to authorize SDNY proceedings to be held in Guantánamo Bay. This method was suggested in a 2020 New York City Bar report envisioning that:

1. Congress would amend 28 U.S.C. § 112 (which divides New York State into separate judicial districts) to temporarily expand the jurisdiction of the Southern District of New York to encompass the U.S. Naval Base at Guantánamo and designate Guantánamo as a place of holding court for limited purposes.
2. The cases presently pending before the military commissions would be assigned to judges sitting within the Southern District of New York
3. The judges would hold case management hearings and set paths forward for proceeding to trial and final judgment.³⁶⁶

The end of law of war detention authority would also suggest that the DOJ should assume control of the defendants’ detention site.

Judicial experience conducting remote business during the COVID-19 pandemic should make federal trials at Guantánamo even more viable now. Preliminary matters not involving Confrontation Clause rights, potentially including initial juror screening, could be handled remotely to reduce the number of persons requiring transportation to Guantánamo. Final jury selection and all actual trial sessions should take place in the defendants’ physical presence, however, to minimize potential grounds for appeal.

³⁶⁴ The current prohibition was included as § 1401 of the FY 2021 National Defense Authorization Act, H.R. 6395, enacted as 116 P.L. 283, 134 Stat. 3388.

³⁶⁵ *See, e.g.*, H.R. REP. NO. 117–118, at 559 (2021) (Reporting House Armed Services Committee vote declining to extend the ban by a 31–28 vote).

³⁶⁶ N.Y. CITY BAR, *supra* note 243, at 2.

To make this scenario happen, President Biden would have to display the same fortitude that President Bush did fifteen years ago, putting the onus on Congress either promptly to enact legislation authorizing a federal trial in one of those two locations or to bear responsibility for their release. But the end of Afghan hostilities, and fifteen more years of commission failures, should give him a stronger hand now than the one that President Bush successfully played in 2006.

2. Accused USS Cole “Mastermind” Abd al-Rahim al-Nashiri

Al-Nashiri’s prosecution is even more disadvantaged by trial as a law of war offense than the 9/11 case as well as by serious government legal gaffes. In April 2019, a unanimous D.C. Circuit Court of Appeals panel invalidated “every single pre-trial order issued over the past three-and-a-half years” due to the military judge’s conflict of interest issues.³⁶⁷ Although the government frequently blames the defense for slowing progress, Judge David Tatel’s opinion noted:

[C]riminal justice is a shared responsibility. Yet in this case, save for Al-Nashiri’s defense counsel, all elements of the military commission system—from the prosecution team to the Justice Department to the [United States Court of Military Commission Review] to the judge himself—failed to live up to that responsibility.³⁶⁸

This setback, coupled with legal issues that should ultimately defeat a military prosecution—if not at trial, then on appeal—suggests that a final outcome is still years away. A key problem is that the law of war only applies to times of hostilities. The U.S. military did not recognize the existence of an armed conflict when the USS Cole was bombed (the author commanded a Navy frigate at the time), and the U.S. response relied solely on peacetime measures and criminal law processes.³⁶⁹

³⁶⁷ See Steve Vladeck, *Al-Nashiri III: A No Good, Very Bad Day for U.S. Military Commissions*, JUST SEC. (Apr. 16, 2019), <https://www.justsecurity.org/63663/al-nashiri-iii-a-no-good-very-bad-day-for-u-s-military-commissions/> [<https://perma.cc/8NBJ-DM5D>].

³⁶⁸ *In re Al-Nashiri*, 921 F.3d 224, 239 (D.C. Cir. 2019).

³⁶⁹ Brief for Retired Military Admirals and Generals as Amici Curiae Supporting Respondent, *Al-Nashiri v. Obama*, 76 F. Supp. 3d 218 (D.D.C. 2014).

Even if the case somehow clears that hurdle, a warship exemplifies a lawful wartime target, so the attack must be proven to be perfidious. But sailors need not wear uniforms, and enemy vessels may be approached in disguise. Commission proceedings will put the Cole crew on trial because the commission will need to determine whether the terrorists treacherously deluded them or benefitted from the ship's readiness gaps. The Navy's investigation showed the Cole failed to comply fully with peacetime anti-terrorism mandates, so it will be difficult to prove the requisite treachery to constitute a war crime.³⁷⁰

These issues are irrelevant in a federal trial. The attack took place during peacetime. No law allowed it; the crew enjoyed the same right to life as all other humans. Striking the Cole with a massive boat-borne bomb was a clear-cut crime with no possible legal justification. As Professor Bobby Chesney has articulated, the most straightforward charge would be violation of 18 U.S.C. § 2332a—"Use of weapons of mass destruction," enacted six years before the attack.³⁷¹ If admissible evidence can tie al-Nashiri to the explosion, conviction should be virtually assured.

Since the crime took place abroad, Article III permits its trial at "such Place . . . as the Congress may by Law have directed."³⁷² Two others accused in the incident were indicted in the SDNY in 2003. Al-Nashiri, who was in CIA custody at the time, was named as a co-conspirator but apparently not charged to avoid any obligation to produce him in a U.S. court.³⁷³ It now seems essential, however, that the government quickly produce an indictment to justify his continued detention. Depending on how Congress authorizes detainee prosecutions (i.e., removing transfer restrictions or letting a federal court sit in Guantánamo), options for al-Nashiri could include prosecution in the SDNY or Eastern District of Virginia. The latter venue would facilitate victim attendance while avoiding New York congestion. Furthermore, that district has successfully handled more terrorism prosecutions than any other U.S. jurisdiction.³⁷⁴

³⁷⁰ See, e.g., STAFF OF H. ARMED SERVS. COMM. STAFF, 107TH CONG., THE INVESTIGATION INTO THE ATTACK ON THE U.S.S. COLE 14 (May 2001) (noting that the ship did not carry out 31 of 62 required force protection measures).

³⁷¹ Chesney, *supra* note 347.

³⁷² U.S. CONST. art. III, § 2, cl. 3.

³⁷³ See Pete Erickson et al., *Twenty Years After the USS Cole Attack: The Search for Justice*, 13 COMBATING TERRORISM CTR. SENTINEL 10, 46 (Oct. 2020).

³⁷⁴ In data reported through 2016, the Eastern District of Virginia had been the site of more terrorism prosecutions than any other district in the country. SDNY came in seventh with less than one-fourth the number of cases prosecuted in the Eastern District of Virginia. See

3. Afghanistan Resistance Leader Abd al-Hadi al-Iraqi (Hadi)

Hadi's situation is unique for several reasons. He is the only professionally trained soldier to face a Guantánamo commission, having served in Saddam Hussein's army before travelling to Afghanistan. His charges, other than an extremely broad "conspiracy" allegation, reflect his role as a resistance leader rather than terrorist. *The New York Times* "Guantánamo Docket" helpfully summarizes Hadi's backstory:

Mr. Hadi, a citizen of Iraq, was charged before a military commission for allegedly commanding Qaeda or Taliban forces in Afghanistan that were accused of war crimes against U.S. and allied forces around 2002-2004. He was captured in Turkey in 2006 and held by the Central Intelligence Agency as a "high-value detainee," then transferred to U.S. military custody at Guantánamo Bay on April 26, 2007. He says his real name is Nashwan al-Tamir. He has degenerative disc disease, has undergone repeated surgery in military custody and has used a wheelchair and hospital bed in court.³⁷⁵

But for the pending charges, Hadi's medical condition should have resulted in his release years ago. He already had back issues when captured and is now reportedly unable to walk.³⁷⁶ His prosecution makes little sense in the overall context of the Afghan conflict. The charges are based on relatively minor incidents in a war that saw 2,448 U.S. and 1,144 allied service personnel die (not to mention the staggering Afghan death toll), and the United States released *far* bigger fish at both Obama's and Trump's behest.³⁷⁷

The most concerning allegations in his charge sheet are paragraphs 54–56 alleging that he facilitated operations by al Qaeda in Iraq in 2005–06.

One in Five International Terrorism Prosecutions in Eastern Virginia, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (TRAC) (Aug. 8, 2016), <https://trac.syr.edu/tracreports/crim/431/> [<https://perma.cc/HC7Z-K9MD>].

³⁷⁵ *The Guantánamo Docket*, *supra* note 15.

³⁷⁶ See Carol Rosenberg, *Iraqi Detainee Reported Suffering Paralysis at Guantánamo*, N.Y. TIMES (Sept. 10, 2021), <https://www.nytimes.com/2021/09/10/us/politics/iraqi-detainee-paralysis-guantanamo.html> [<https://perma.cc/9RTJ-STFY>].

³⁷⁷ Jerry Dunleavy, *From Prison to Power: Taliban Leaders Go from Jail, to Negotiating Table, to Kabul*, YAHOO (Aug. 18, 2021), <https://www.yahoo.com/now/prison-power-taliban-leaders-jail-110000033.html> [<https://perma.cc/FVH4-QUAD>].

If true, that assertion could justify a credible criminal prosecution. However, the proper authority would be the government of Iraq since the fight there had already become a non-international conflict by then.

The combination of Hadi's physical deterioration and end of the Afghan conflict effectively preclude him from harming the United States. The proper disposition would be to repatriate him to Iraq and let its government decide how to handle him.

4. Indonesian Bombing Suspect Encep Nurjaman and Two Co-conspirators

The last three detainees identified as possible commission defendants, Encep Nurjaman (alias Hambali), Mohammed Farik Bin Amin (Zubair), and Mohammed Nazir Bin Lep (Lillie) were arraigned at Guantánamo on August 31, 2021. The session took place the day after U.S. participation in the Afghan war ended and was plagued by translation problems.³⁷⁸ The Office of Military Commissions website summarizes the charges:

Encep Nurjaman; Mohammed Nazir Bin Lep; and Mohammed Farik Bin Amin are charged jointly in connection with their alleged roles in the bombing of nightclubs in Bali, Indonesia in 2002 and the bombing of a J.W. Marriott hotel in Jakarta, Indonesia in 2003. The charges include conspiracy, murder, attempted murder, intentionally causing serious bodily injury, terrorism, attacking civilians, attacking civilian objects, destruction of property, and accessory after the fact, all in violation of the law of war.³⁷⁹

The charge sheets provide more detail. The sheets state that Hambali, as they call Nurjaman in nine pages of "common allegations," was a jihadist who fought the Soviets in Afghanistan before becoming a regional leader for "the Southeast Asian terrorist organization Jemaah Islamiya (JI)."³⁸⁰ JI leadership "agreed to partner with al Qaeda in jihad," and Hambali received

³⁷⁸ See generally Biden, *supra* note 206; Carol Rosenberg, *Three Guantánamo Detainees Charged in 2002 Bali Bombing*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/08/31/us/politics/guantanamo-bali-bombing.html> [<https://perma.cc/A3M5-GTW5>].

³⁷⁹ Office of Military Commissions, *Cases: Encep Nurjaman et al.*, <https://www.mc.mil/CASES.aspx> [<https://perma.cc/AD4N-GPG6>].

³⁸⁰ U.S. Dep't of Def., MC Form 458, Charge Sheet, Encep Nurjamen, at Block II continuation sheet para. 1 (Apr. 5, 2019).

funds from them in order to conduct attacks in several countries; the only successful bombings were in Indonesia between 2000–03.³⁸¹ The most significant were the 2002 Bali nightclub blasts, which killed 202 people from twenty-two countries, including eighty-eight Australians and seven Americans, and a 2003 attack on the J.W. Marriot hotel in Jakarta, which killed eleven (all Dutch or Indonesian) and wounded three Americans.³⁸²

Even if all the allegations are true, JI appears to have lacked sufficient organization, and the sporadic acts the sustained intensity, required to constitute an armed conflict, and there is no indication that any country recognized it as such.³⁸³ Despite al Qaeda's financial support and training, the allegations show that JI acted with sufficient autonomy that its actions cannot credibly be considered part of a U.S. conflict with them.³⁸⁴ The bombings lack the requisite connection to *any* armed conflict to constitute war crimes, and there is no credible legal authority to justify the eighteen-year U.S. pre-arraignment detention of these accused in the first place.

With victims and their families in more than twenty countries already frustrated by delayed justice, trying a flawed case in a flawed system that will take years to conclude, with a real prospect of ultimate failure, does no one any favors.³⁸⁵ And it may subject the commissions to fresh global scrutiny, further tarnishing U.S. credibility. Since Americans were victims of both attacks, federal prosecution is possible.³⁸⁶ But given the geographic location of the bombings, and the much greater numbers of their nationals who were victims, either Indonesia or Australia is a more appropriate venue.

Both countries and the United States are parties to the 1997 Convention for the Suppression of Terrorist Bombings, which includes an *aut dedere aut judicare* obligation and may be used as the basis for extradition

³⁸¹ *Id.* ¶¶ 2, 18–34, 40–60.

³⁸² *Id.* ¶¶ 46, 60.

³⁸³ *See id.* ¶¶ 17–60.

³⁸⁴ *See id.*

³⁸⁵ *See, e.g.,* Stephanie March & Roscoe Whalan, *Bali Bombing Survivor “Dumbfounded” Alleged Mastermind Hambali yet to Face Trial After 15 Years in Custody*, AUSTL. BROAD. CORP., (Feb. 12, 2018), <https://www.abc.net.au/news/2018-02-13/alleged-bali-bombing-mastermind-hambali-yet-to-face-trial/9421738> [<https://perma.cc/9SDJ-FXJR>] (reporting victim frustration and concerns about U.S. commission proceedings).

³⁸⁶ *E.g.*, 18 U.S.C. §§ 2332(a) (homicide), 2332(b) (attempt or conspiracy with respect to homicide), and 2332a (use of weapons of mass destruction) each apply to crimes committed against Americans “outside [of] the United States,” giving federal courts jurisdiction over both the Bali and Jakarta bombings.

by states requiring treaty authority to do so.³⁸⁷ The U.S. extradition statute generally requires an actual bilateral agreement, which the United States has with Australia but not with Indonesia.³⁸⁸ But that statute allows the extradition of foreign nationals without a treaty if the conduct would have been a crime in this country and U.S. nationals were victims.³⁸⁹ These detainees can thus be extradited to either country, and it would be in the U.S. national interest to select one, with federal criminal trial as a fallback option.

B. Detainees Previously Convicted by a Military Commission

The two detainees in this category *should* be easy dispositions. Even the Geneva Conventions permit continued detention to serve out judicial sentences.³⁹⁰ But there are several factors to consider before concluding that continued detention is the appropriate approach.

The first is simply where to detain them once Guantánamo is closed. At most, it may require having Congress modify the detainee transfer ban allowing their move to a stateside prison; some authorities argue that the president has inherent executive authority to do this unilaterally.³⁹¹ MCA §949u permits confinement in any facility under U.S. control.³⁹² They could be held in any DoD site used for post-conviction inmates or a DOJ facility such as the Colorado “supermax” prison that houses convicted terrorists under more punitive conditions than Guantánamo.³⁹³

³⁸⁷ International Convention for the Suppression of Terrorist Bombings arts. 6, 9, Dec. 15, 1997, 2149 U.N.T.S. 284, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-9&chapter=18&clang=_en [https://perma.cc/TM5S-9P3M].

³⁸⁸ 18 U.S.C. § 3181(a) states, “The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.” The associated notes provide a list of current U.S. bilateral extradition treaties.

³⁸⁹ 18 U.S.C. § 3181(b).

³⁹⁰ Geneva III, *supra* note 61, art. 119; Geneva IV, *supra* note 61, art. 133.

³⁹¹ See, e.g., Gregory B. Craig & Cliff Sloan, *The President Doesn’t Need Congress’s Permission to Close Guantanamo*, WASH. POST (Nov. 6, 2015), https://www.washingtonpost.com/opinions/the-president-doesnt-need-congresss-permission-to-close-guantanamo/2015/11/06/4cc9d2ac-83f5-11e5-a7ca-6ab6ec20f839_story.html [https://perma.cc/7LJH-DJCE].

³⁹² Codified at 10 U.S.C. §950i.

I. ³⁹³ Robert Windrem, *Worse Than Guantanamo? Terror Suspects Face Infamous Colorado Supermax*, NBC NEWS (Apr. 19, 2016), <https://www.nbcnews.com/news/us-news/new-prison-would-be-safer-harsher-much-colder-guantanamo-n542741> [https://perma.cc/9KE8-NAY2].

A second consideration stems from the commissions' problematic handling of both men. Guantánamo habeas challenges are all heard in the D.C. Circuit. Relocation to a U.S. site opens the door to new actions in the district(s) where they are sent. That could result in fewer favorable outcomes for the government and more adverse publicity, suggesting that release could be more advantageous instead.

1. Majid Shoukat Khan

The New York Times "Guantánamo Docket" summarizes Khan's story:

Mr. Khan, a citizen of Pakistan who attended high school in Maryland, was captured in Pakistan in 2003. He was transferred to Guantánamo in September 2006 as a "high-value detainee" after 1,200 days in the custody of the Central Intelligence Agency. In February 2012, he turned government cooperator and pleaded guilty to war crimes for serving as a courier of funds, from Khalid Shaikh Mohammed to a Qaeda affiliate in Southeast Asia, that were used in a terrorist bombing in Indonesia after his capture. On Oct. 28, 2021 he stood before a military jury in open court and offered a detailed, two-hour account of his years of torture by the C.I.A. The eight-officer jury issued him a 26-year prison sentence, one more year than the minimum under sentencing guidelines. Seven of the jurors also wrote a clemency letter on his behalf. A senior Pentagon official declared his sentence complete on March 1, 2022. His lawyers argue that expiration of his sentence means he should be promptly released, although the U.S. had yet to reach a deal with a country to receive him.³⁹⁴

Since both Khan's sentence and U.S. law of war detention authority have ended, there is no legal basis for delaying his release in order to obtain security assurances. Khan's personal account of his torture was widely reported in world media, as were the conclusions of the officers on the sentencing panel that his treatment was "a stain on the moral fiber of

³⁹⁴ *The Guantánamo Docket*, *supra* note 15 (This source is periodically updated; the quoted language was verified to be current as of April 16, 2022).

America” and “a source of shame for the U.S. government.”³⁹⁵ After the embarrassment of the sentencing hearing, U.S. interests would be best served by releasing him promptly rather than opening any doors to further discussion or even litigation about his situation.

2. Ali Hamza Ahmad Suliman al-Bahlul

“The Guantánamo Docket” provides this summary of al-Bahlul’s history:

Mr. Bahlul, a citizen of Yemen, is serving a life sentence imposed by the Guantánamo military commissions system. He was captured by Pakistani forces near the border with Afghanistan in December 2001 and was among the first batch of detainees brought to Guantánamo on the day the prison opened the following month. Accused of being a propaganda chief for Al Qaeda and a media secretary for Osama bin Laden, he refused to participate in his 2008 military trial and mostly sat mute beside an Air Force lawyer who was assigned to defend him. A panel of U.S. military officers convicted him of three terrorism-related charges on Nov. 3, 2008. Two of the convictions were subsequently *overturned for technical reasons*. For example, an appeals court ruled that “providing material support for terrorism,” one of his charges, was not a recognized war crime and so could not be brought before a military tribunal.³⁹⁶

Transferring al-Bahlul to a stateside prison to serve out his life sentence seems an obvious solution. He is not a terrorist *per se*; as he announced during his trial, “you are prosecuting a media man . . . you are not prosecuting an al Qaeda member who is about to do an operation.”³⁹⁷ He is hardly a physical threat, which should minimize public objection to transferring him to a U.S. facility. But it would be unjust due to fundamental flaws in his “conviction.”

³⁹⁵ *The Handwritten Document*, N.Y. TIMES (Oct. 31, 2021), <https://www.nytimes.com/interactive/2021/10/31/us/khan-clemency-letter.html> [<https://perma.cc/T38P-GR2B>]; see also Rosenberg & Barnes, *supra* note 293.

³⁹⁶ *The Guantánamo Docket*, *supra* note 15 (emphasis added).

³⁹⁷ Michael J. Lebowitz, “*Terrorist Speech*”: *Detained Propagandists and the Issue of Extraterritorial Application of the First Amendment*, 9 FIRST AMEND. L. REV. 573, 575 (2011).

Al-Bahlul did not want to boycott his trial; he wanted representation by co-national counsel he could trust.³⁹⁸ However, the commission rules barred his request even though it would be allowed in courts-martial and supported by U.S. and foreign practice in prosecuting international law violations since World War II.³⁹⁹ So there is a strong argument that customary international law now provides this right.⁴⁰⁰ Al-Bahlul's fallback was self-representation, which the MCA did authorize.⁴⁰¹ But that right was denied in a way that suggested lack of government good faith. The judge then forced Air Force Judge Advocate David Frakt to defend him. As Frakt later explained, "Unable to represent himself and unwilling to be represented by a U.S. military officer, someone whom he considered to be an enemy, Mr. Al Bahlul mounted no defense."⁴⁰² This issue was not raised on appeal.⁴⁰³

A second key issue is that none of the charges that al-Bahlul was convicted of (e.g., conspiracy, solicitation, or providing material support to terrorism) are recognized war crimes. A D.C. Circuit Court of Appeals opinion by Judge (now Justice) Brett Kavanaugh invalidated the material support charge in Hamdan's appeal.⁴⁰⁴ The government acknowledged that the same logic applied to solicitation and conspiracy, and the D.C. Circuit obliged with a terse *per curiam* decision overruling all al-Bahlul's convictions.⁴⁰⁵ But a convoluted multi-stage appellate process ultimately ended in a fractured 2016 en banc decision allowing the conspiracy conviction to stand. Four of the nine judges thought that Congress could let a commission try conspiracy even if not a recognized war crime; one would have held that al-Bahlul was not actually convicted of the inchoate crime of conspiracy; and a sixth believed that the court was only reviewing for plain error and did not need to make a precise legal judgment.⁴⁰⁶

³⁹⁸ See Glazier, *supra* note 316, at 306.

³⁹⁹ See Glazier, *supra* note 35, at 931–32.

⁴⁰⁰ See *id.* at 928–33 (discussing issues with denying detainees representation by counsel of their own choosing, including particularly co-nationals). See also ICCPR, *supra* note 267, art. 14, ¶ 3(b) (providing the right "to communicate with counsel of his own choosing").

⁴⁰¹ Glazier, *supra* note 316, at 306; 10 U.S.C. § 949a(b)(2)(D).

⁴⁰² David J. R. Frakt, *Guest Post: David J. R. Frakt on the Al-Bahlul Amicus Brief*, OPINIOJURIS (July 28, 2013), <http://opiniojuris.org/2013/07/28/guest-post-david-j-r-frakt-on-the-al-bahlul-amicus-brief/> [<https://perma.cc/G4ZW-JJFA>].

⁴⁰³ *Id.*

⁴⁰⁴ Hamdan v. United States, 696 F.3d 1238, 1240–41 (D.C. Cir. 2012).

⁴⁰⁵ Al Bahlul v. United States, No. 11-1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013) (*per curiam*), *rev'd en banc*, 767 F.3d 1 (2014).

⁴⁰⁶ Al Bahlul v. United States, 840 F.3d 757 (D.C. Cir. 2016) (en banc).

This question is not just one of charge nomenclature or mode of liability. The larger issue is that al-Bahlul's actions do not constitute war crimes no matter *how* they are charged and are outside the jurisdiction of a law of war tribunal. One of the prosecutors later colorfully described al-Bahlul's role:

Al-Bahlul was certainly a devoted and trained al Qaeda member, but his role in the terrorist organization was anything but typical. Instead of dabbling directly in bombs and kidnappings, al-Bahlul dealt with video production equipment, cameras, and video-editing software. This is because al-Bahlul was the head of As-Sahaab, al Qaeda's in-house media foundation. Tasked directly by Osama bin Laden, al-Bahlul produced propaganda and recruiting videos while essentially serving as bin Laden's "Public Relations Secretary." As such, al-Bahlul was more Sean McManus (head of CBS News) than Khalid Shaykh Muhammad (purported 9/11 mastermind) as he performed his duties in a manner more akin to Michael Moore (controversial documentary filmmaker). But despite the First Amendment protections offered to U.S. citizens, it was these media activities that ultimately served to condemn al-Bahlul to life in U.S. military custody as a convicted war criminal.⁴⁰⁷

The First Amendment is a red herring. While it may determine whether conduct can be prosecuted under U.S. domestic law, what matters here is that neither propagandizing nor recruiting constitutes war crimes. This prosecution is thus effectively based on the notion that al-Bahlul was acting on behalf of the wrong side, but law of war rules are entirely divorced from the legitimacy of the cause fought for.⁴⁰⁸

Al-Bahlul has now spent more than twenty years in U.S. custody—the normal maximum term for material support to terrorism, the most likely federal crime of which he could have been convicted *if* it had extraterritorial application to a non-citizen at the time of his conduct—and more time than the “American Taliban” John Walker Lindh served.⁴⁰⁹ Rather than invite

⁴⁰⁷ Lebowitz, *supra* note 402, at 573–74.

⁴⁰⁸ See, e.g., DINSTEIN, *supra* note 86, at 3–4.

⁴⁰⁹ E.g., Matthew Barakat, “American Taliban” John Walker Lindh Is Released from Prison, ASSOCIATED PRESS (May 23, 2019), <https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-in-state-wire-24e30be3a75949b7aa3b30946703140d> [<https://perma.cc/AWP8-GEM9>].

renewed litigation and international criticism, a more pragmatic approach would be a conditional release tantamount to parole. Manual for Military Commission rule 1108 allows full or partial suspension of a sentence, effectively “grant[ing] the accused a probationary period” after which “the suspended part of the sentence shall be remitted.”⁴¹⁰ In this unique case, it would provide an articulable legal basis for imposing post-release conditions upon his future conduct.

***C. Held in Law of War Detention but Recommended for Transfer
“If Security Conditions Met”***

The disposition of sixteen of the eighteen men in this category is *actually* easy. Unlike al-Bahlul, they have never been convicted; the only basis for *ever* holding them was purported preventive law of war detention authority. But the war is over, so that authority has definitively ended, and they must be promptly repatriated, period.

This classification should always have been troubling. First, the standard that the Periodic Review Boards (PRBs) implemented during the Obama Administration—justifying detention if an individual poses “a continuing significant threat to the security of the United States”—was too low.⁴¹¹ It falls short of the standards articulated in the Fourth Geneva Convention that detention be “absolutely necessary” or for “imperative reasons of security,”⁴¹² resulting in over-detention. Further, the PRBs adopted a civilian parole board-type approach, effectively requiring detainees to be fully forthcoming about past conduct, express remorse, and provide information about how they would rehabilitate themselves if released.⁴¹³ This standard makes sense for individuals who have been validly convicted of actual crimes, but it creates real problems for individuals detained in error who have no meaningful information about prior affiliation with anti-U.S. violence to admit and are unwilling to perjure themselves.

⁴¹⁰ U.S. DEP’T OF DEF., *supra* note 291, Rule 1108.

⁴¹¹ See Andy Worthington, *Periodic Review Board Decides Yemeni at Guantánamo Still Poses a Threat 14 Years After Capture*, CLOSE GUANTÁNAMO (Apr. 9, 2016), <https://www.closeguantanamo.org/Articles/206-Periodic-Review-Board-Decides-Yemeni-at-Guantanamo-Still-Poses-A-Threat-14-Years-After-Capture> [https://perma.cc/3E2F-CVN5].

⁴¹² See discussion Part I.C.2. *supra*.

⁴¹³ See, e.g., Worthington, *supra* note 416.

Moreover, in the human rights era, it is hard to fathom where other states found legal authority to honor U.S. requests to restrict the liberty of individuals never convicted of any crime. Although the ICCPR allows some liberty restrictions in the interests of a state's own national security, they must be grounded in actual domestic law and subject to judicial review.⁴¹⁴ Not surprisingly, leading U.S. allies seemed to reject this approach; detainees transferred to the United Kingdom, for example, were quickly released after only an absolutely minimalist show of deference to U.S. concerns.⁴¹⁵ And this Article suspects it is why Australian David Hicks and Canadian Omar Khadr had to plead guilty, allowing their repatriation under agreements calling for completion of their "sentences" rather than subject to release "conditions." But the United States convinced many less influential countries to impose restrictions on detainees who never faced charges.

This category is an artificial post-9/11 creation, lacking any foundation in the law of war. Individuals who did not clearly meet the requisite standard for continued law of war detention should have been promptly released. Several of the individuals in this group have languished in U.S. detention for years after being placed in this category. The end of the conflict makes this issue moot. Although some recent public discussion continues to suggest making transfers with security conditions attached, none identify any actual legal authority for doing so.⁴¹⁶

Two of the detainees in this category might pose a bit of a challenge. Ridah Bin Saleh al Yazidi and Muieen Abd al Sattar have been approved for transfer for over a decade but have not cooperated with efforts to find a country willing to accept them on U.S. terms. Al Yazidi is a Tunisian who has declined to meet with officials of his government, while al Sattar is a stateless Rohingya who has no country to return to. Both are reportedly "too profoundly damaged—either mentally ill or accustomed to their institutionalization—to try to seek a way out."⁴¹⁷ While Yazidi might simply be returned to Tunisia even if he prefers to stay at Guantánamo, it will take more effort to find a place to send Sattar. Both should be easier to resolve,

⁴¹⁴ See ICCPR, *supra* note 267, arts. 9, 12, 19, 21.

⁴¹⁵ See, e.g., MOAZZAM BEGG, ENEMY COMBATANT: MY IMPRISONMENT AT GUANTÁNAMO, BAGRAM, AND KANDAHAR 356–64 (2006).

⁴¹⁶ See, e.g., Ian Moss, *There Is a Way to Close Guantánamo*, JUST SEC. (Jan. 11, 2022), <https://www.justsecurity.org/78166/there-is-a-way-to-close-guantanamo/> [<https://perma.cc/YVZ7-MZ9M>].

⁴¹⁷ Carol Rosenberg, *5 Were Cleared to Leave Guantánamo. Then Trump Was Elected*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/10/09/us/politics/guantanamo-prisoners-trump.html> [<https://perma.cc/6952-SLKU>].

however, once it is acknowledged that a destination state cannot be obligated to satisfy U.S. security demands.

D. Held in Law of War Detention and Not Recommended for Transfer

The seven individuals remaining in this category, previously termed “forever detainees,”⁴¹⁸ also have an easy legal answer. The war is over, and their preventive detention must likewise end. There is no post-conflict “bad dude” exception; unless these detainees can be charged with a federal crime or extradited to face pending charges, the law requires their repatriation.

The politics may be harder—pundits were still arguing that the Taliban’s resurgence called for keeping Guantánamo open beyond the date that Trump’s agreement set as the end of U.S. participation in hostilities.⁴¹⁹ And despite the Taliban victory, some continue to discuss options like negotiated release conditions lacking a clear legal basis.⁴²⁰ Nonetheless, even the most hardcore enemy soldiers are entitled to unconditional release at war’s end, and the Constitution charges the President with “tak[ing] care that the laws be faithfully executed.”⁴²¹ It should not matter whether that includes international law; the Supreme Court in a plurality opinion held that AUMF-authorized detention ends with the close of active hostilities in Afghanistan.⁴²² However, it would still be politically prudent for the Administration to articulate why the public should not lose sleep over the release of these seven detainees.

First, of course, this number is wholly insignificant compared to the 532 detainees released by the Bush Administration, 197 under Obama, and the 5,000 Taliban freed at Trump’s direction. While reported detainee recidivism has attracted considerable attention, the “figures” documented in a 2019 Director of National Intelligence (DNI) report are not all that

⁴¹⁸ See, e.g., Kelsey Vlamis, “Forever Prisoners”: 39 Remain at Guantanamo Bay 20 Years After 9/11, Including Some Who Have Never Been Charged, *BUSINESS INSIDER* (Aug. 28, 2021), <https://www.businessinsider.com/guantanamo-bay-9-11-how-many-prisoners-charges-details-history-2021-8> [<https://perma.cc/L9Z2-WPMR>].

⁴¹⁹ Pfeiffer, *supra* note 364.

⁴²⁰ See, e.g., Moss, *supra* note 422.

⁴²¹ U.S. CONST. art. II, § 3.

⁴²² *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion).

alarming, and it likely errs on the side of overstatement.⁴²³ The report states that the “confirmed” re-engagement rate was 21.6% for Bush Administration releasees, but just 4.6% for those later freed under Obama, with another 15.4% of Bush and 10.2% of Obama releasees “suspected” of having done so.⁴²⁴ These statistics seem counterintuitive given that the Obama releasees should have had multiple reviews during the Bush years and been vetted for continued detention each time, so on average they should have been expected to be more dangerous.

Two factors likely explain the differences. First, initial Guantánamo releasees were apparently not well screened.⁴²⁵ This assertion is supported by anecdotal evidence that while Hamdan was on trial for being *a* bodyguard for Osama bin Laden, bin Laden’s *chief* bodyguard had been released and was back in Morocco.⁴²⁶ It probably also reflects the impact of extended captivity. War is a young man’s game. Those released after close to a decade in U.S. captivity would predictably be more physically and mentally worn down than early releasees and less enthused about militancy. They also would have had fewer remaining ties with groups engaged in ongoing conflicts, particularly one featuring U.S. targeted killing of the leaders they might have known. Detainees who have now been held for two decades should predictably be much less likely—or able—still to “reengage.”

Even *if* the remaining “forever” detainees reengaged at the same rate as those freed under Obama (a minimum of five years earlier), that would only predict at most a single recidivist. Moreover, “reengagement” has only involved participation in a regional insurgency or conflict; no former detainee has conducted an attack in the United States. With much improved U.S. security measures implemented since 9/11, including 60,000 dedicated Transportation Safety Agency employees, they should be even less likely to

⁴²³ Hum. Rts. Watch, *Q&A: Guantanamo Bay, US Detentions, and the Trump Administration* (June 27, 2018), <https://www.hrw.org/news/2018/06/27/qa-guantanamo-bay-us-detentions-and-trump-administration#q5> [<https://perma.cc/8KGC-SXGK>].

⁴²⁴ JOSEPH MAGUIRE, SUMMARY OF THE REENGAGEMENT OF DETAINEES FORMERLY HELD AT GUANTANAMO BAY, CUBA 1–2 (Nov. 25, 2019), <https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2019/item/2079-summary-of-the-reengagement-of-detainees-formerly-held-at-guantanamo-bay-cuba> [<https://perma.cc/X2EH-5X39>].

⁴²⁵ See generally Hum. Rts. Watch, *supra* note 429; MARK DENBEAUX ET AL., FELLOWS CTR. FOR POL’Y AND RSCH., PROFILE OF RELEASED GUANTÁNAMO DETAINEES: THE GOVERNMENT’S STORY THEN AND NOW (Aug. 8, 2008), <http://ssrn.com/abstract=1985701> [<https://perma.cc/NM5M-C5LX>].

⁴²⁶ See BRAVIN, *supra* note 16, at 330–31; *The Guantánamo Docket*, *supra* note 15.

do so now even if any still had sufficient motivation and resilience.⁴²⁷ This level of risk would hardly justify spending a half billion dollars a year to keep Guantánamo open (if doing so were a legal option) when the most significant dangers that Americans face today are domestic threats.⁴²⁸

The “forever” detainee whose release should have been the most controversial is Saudi national Mohammed al-Qahtani, believed to have been an intended 9/11 participant (the “twentieth hijacker”) until he was denied entry to the United States.⁴²⁹ Al-Qahtani was brought to Guantánamo in February 2002 and subjected to sustained abuse during which he was “deprived of sleep and water, kept nude and was menaced by dogs.”⁴³⁰ He was earmarked for trial with Khalid Sheikh Mohammed, but the convening authority, Cheney protégé Susan Crawford, refused to approve charges after determining that his treatment constituted torture.⁴³¹ Al-Qahtani has had mental health issues since suffering a traumatic brain injury as an adolescent and now suffers from severe schizophrenia.⁴³² In March 2020, a federal judge ordered a mixed medical commission to evaluate him, which would have been a Guantánamo first. The order was based on an Army detention directive rather than the Third Geneva Convention *per se*, which Trump’s Secretary of the Army revised in his last week in office to specify that it did not apply to Guantánamo.⁴³³ The commission apparently never took place, but after a Navy doctor found al-Qahtani too impaired to be a meaningful threat, the

⁴²⁷ See, e.g., David P. Pekoske, *20 Years After 9/11: The State of the Transportation Security Administration*, TRANSP. SEC. ADMIN. (Sept. 29, 2021), <https://www.tsa.gov/news/press/testimony/2021/09/29/20-years-after-911-state-transportation-security-administration> [https://perma.cc/HE2L-ERZA].

⁴²⁸ U.S. Dep’t of Homeland Sec., *Summary of Terrorism Threat to the U.S. Homeland* (Aug. 13, 2021), <https://www.dhs.gov/ntas/advisory/national-terrorism-advisory-system-bulletin-august-13-2021> [https://perma.cc/32JW-UQFA].

⁴²⁹ Daniel A. Medina, *He Is One of Only 39 Detainees Left at Guantanamo. Once Tortured, Prisoner's Case Is a Test of Larger Political Realities at Play*, CNN (Aug. 5, 2021), <https://www.cnn.com/2021/08/05/politics/guantanamo-detainee-qahtani-biden-invs/index.html> [https://perma.cc/45RW-43KF].

⁴³⁰ Carol Rosenberg, *Pentagon Moves to Block Exam of Tortured Guantánamo Prisoner*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/15/us/politics/guantanamo-prisoner-health-torture.html> [https://perma.cc/AK3A-Y4QD].

⁴³¹ Andy Worthington, *Bush Era Ends with Guantánamo Trial Chief's Torture Confession* (Jan. 20, 2009), <http://www.andyworthington.co.uk/2009/01/20/bush-era-ends-with-guantanamo-trial-chiefs-torture-confession/> [https://perma.cc/H5YD-2464].

⁴³² Carol Rosenberg & Charlie Savage, *Panel Backs Transfer of Mentally Ill Guantánamo Detainee Suspected of 9/11 Role*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/us/politics/guantanamo-detainee-transfer.html> [https://perma.cc/4P2T-3RPW].

⁴³³ Medina, *supra* note 435.

Biden Administration made the logical decision to repatriate him to Saudi Arabia to receive appropriate mental health care.⁴³⁴ The decision produced little public reaction; Fox News reported it with a matter of fact tone and just three Republican senators objected in a very short letter to President Biden requesting reconsideration.⁴³⁵ No other uncharged detainee's release would seem likely to raise even that modest level of political reaction.

CONCLUSION

The Guantánamo detention facility has been a magnet for global criticism since its January 2002 opening, dissipating the almost universal goodwill that the United States enjoyed in the wake of the 9/11 attacks. Its monetary costs have now likely reached \$7 billion.⁴³⁶ The moral and political damage to U.S. global standing and the recruiting boost to U.S. adversaries—evidenced by ISIS videos with its victims dressed in orange jumpsuits—are incalculable.⁴³⁷ Bush, Obama, and Biden all openly declared their support for ending Guantánamo detention; only Trump dissented, but even he was scathingly critical of the financial costs.

U.S. domestic politics are the ultimate reason that Guantánamo is still open. The late Senator John McCain was virtually the only senior Republican supporting closure, and even many Democrats were less than enthusiastic about doing so.⁴³⁸ Today, the law provides not only the opportunity but also the mandate to do what politics could not achieve and shutter the facility. As

⁴³⁴ Carol Rosenberg, "20th Hijacker" Is Returned to Saudi Arabia for Mental Health Care, N.Y. TIMES (Mar. 7, 2022), <https://www.nytimes.com/2022/03/07/us/politics/saudi-arabia-911-hijacker.html> [<https://perma.cc/HNQ9-2CP6>].

⁴³⁵ See Associated Press, *US Sends Home Suspected 20th 9/11 Hijacker from Guantanamo*, FOX NEWS (Mar. 8, 2022), <https://www.foxnews.com/us/us-sends-home-suspected-20th-911-hijacker-guantanamo> [<https://perma.cc/V54S-9MXZ>] (providing short text from AP and longer Fox News audio account); Press Release, U.S. Senate Comm. on Foreign Rels., Risch, Rubio, Inhofe Urge President Not to Transfer Al-Qaeda Terrorist from Guantanamo (Mar. 2, 2022), <https://www.foreign.senate.gov/press/ranking/release/risch-rubio-inhofe-urge-president-not-to-transfer-al-qaeda-terrorist-from-guantanamo> [<https://perma.cc/5EY4-ZC3N>].

⁴³⁶ The total cost reportedly reached \$6 billion by 2019, with recurring annual expenses of \$380 million *plus* the personnel costs for the 1,800 strong guard force. See Pfeiffer, *supra* note 364; the author estimates that those additional costs add at least another \$100 million a year.

⁴³⁷ See Molly O'Toole, *President Obama Has Begun His Final Push to Close the Offshore Prison. But America's Bigger Challenge Is Deciding What to Do with Tomorrow's Prisoners in a War Without End*, DEF. ONE, <https://www.defenseone.com/feature/beyond-guantanamo/> [<https://perma.cc/FY49-MR4Z>] (last visited Apr. 4, 2022).

⁴³⁸ *Id.*

problematic as many aspects of Guantánamo have been, the law of war's preventive detention authority provided a veneer of legality that has now been peeled away. With the end of the war in Afghanistan, it is now beyond the pale to try to justify continued indefinite detention. The remaining detainees must be promptly charged, extradited to a state that can prosecute them, or repatriated.

Similarly, it is past time to recognize that the military commissions have been a legal and practical failure as well as a colossal waste of U.S. tax dollars. Moreover, they have denied the victims and their families of both the USS Cole and 9/11 the justice that they have awaited for two full decades and could readily have received in federal courts in just a fraction of that time. Both Guantánamo detention and the commissions should have reached their final endpoint.